Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

BETTY WILLINGHAM,

Petitioner,

v.

JAMES LOUGHNAN and BRIAN BEUCLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

On October 7, 2002, this Court vacated the August 15, 2001 opinion of the Court of Appeals for the Eleventh Circuit Court in the instant case and remanded for further consideration in light of *Hope v. Pelzer*, 122 S. Ct. 2508 (2002). On February 18, 2003, the Eleventh Circuit reaffirmed its prior ruling finding that Respondents were entitled to qualified immunity. The issues presented herein pertain to matters which demonstrate a conflict, with the Court of Appeals for the Eleventh Circuit on one side, and this Court as well as the other circuits, on the other side.

1. Whether state officials sued in their individual capacity under 42 U.S.C § 1983, in light of *Hope*, where decisional law had set general parameters for unconstitutional conduct providing "fair warning," are still entitled to qualified immunity unless they have violated statutory or constitutional rights "clearly established" by a "materially similar" case previously decided by this Court, the circuit, or the supreme court of the state.

2. Whether an interlocutory appellate decision rejecting a government official's claim to qualified immunity following a denial of his motion for summary judgment constitutes the "law of the case" and, thereby, precludes a subsequent, and different, appellate panel, following final judgment, from awarding that official qualified immunity?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner in this Court, Betty Willingham, was the plaintiff in the District Court. Willingham was also an appellee and cross-appellant in the Court of Appeals. The Respondents, James Loughnan and Brian Beucler, were defendants in the District Court. They were also appellants in the Court of Appeals. The City of Boynton Beach was a defendant in the District Court and was an appellee in the Court of Appeals. Petitioner, however, does not challenge the District Court's and Eleventh Circuit's rulings in favor of the City.

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Petitioner, Betty Willingham, respectfully petitions the Court for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Edmondson, Black and McKay) awarding Respondents qualified immunity, is reported at 321 F.3d 1299 (11th Cir. 2003) and included as Appendix A. The Order of the Supreme Court remanding this case to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Hope v. Pelzer*, 536 U.S. 730 (2002) is included as Appendix B. The opinion of the United States Court of Appeals for the Eleventh Circuit (Edmondson, Black and McKay) awarding Respondents qualified immunity, is reported at 261 F.3d 1178 (11th Cir. 2001) and included as Appendix C. The opinion of the United States District Court for the Southern District of Florida (Ungaro-Benages, J.), denying Respondents' Motion for Judgment as a Matter of Law, based on qualified immunity, is unreported and included as Appendix D. The order of the United States Court of Appeals for the Eleventh Circuit Denying Petition(s) for Rehearing Dated and Filed February 15, 2002 is attached as Appendix E. The interlocutory opinion of the United States Court of Appeals for the Eleventh Circuit (Anderson, Dubina, and Carnes), rejecting Respondents' claim to qualified immunity, is unreported and included as Appendix F. The opinion of the United States District Court for the Southern District of Florida (Ungaro-Benages, J.), denying Respondents' Motion for Summary Judgment, based on qualified immunity, is unreported and included as Appendix G.

STATEMENT OF JURISDICTION

The final judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 18, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On October 7, 1987, Petitioner Betty Willingham, an African American with no criminal history, was shot eight times by the Respondents Beucler and Loughnan, two members of the Boynton Beach (Florida) Police Department, while she was standing in the doorway of her home. Respondents claimed that, at the time of the shooting, Petitioner had a knife in her hand and was lunging off the step of her home toward a fellow officer. According to the Respondents, Petitioner immediately prior to that had thrown two bottles and one knife in the direction of two officers. Based on the Respondents' claim, the Petitioner was charged in June 1989 with attempted first degree murder and battery on a law enforcement officer. Petitioner, at the criminal proceeding, admitted to throwing two bottles and one knife in the direction of a k-9 dog that was biting her brother. At the time said k-9 was in close proximity of his handler, a police officer. Subsequently, the Petitioner was convicted of attempted *second* degree murder which requires neither specific intent nor premeditation, and battery on a law enforcement officer.

Petitioner filed the present action under 42 U.S.C. § 1983 in 1990, claiming that the eight shots fired by Respondents, under the facts of this case, constituted excessive force in violation of the Fourth Amendment to the United States

Constitution. In essence, Petitioner claimed that she did not pose a threat to the officers or anyone else at the time of the shooting. Respondents moved for summary judgment based upon qualified immunity and Petitioner's conviction in 1995. The District Court denied this motion. *See* Appendix G. Respondents' interlocutory appeal to the Eleventh Circuit was unsuccessful. Instead, the Eleventh Circuit ruled in September 1997 that, under the circumstances as alleged by Petitioner, the law of excessive force was clearly established: "According to Plaintiff, she was shot when she was merely standing in the doorway of her house, screaming and pulling her hair and posing no threat to anyone. If the officers fired on plaintiff even though she was posing no threat to anyone, they would have violated clearly-established law." *See* Appendix F, at 78a.

On March 23, 1998, the case was tried before a jury. On April 10, 1998, the jury returned a verdict in favor of the Petitioner and against the defendant officers and City of Boynton Beach. The jury awarded her $5,000,000 in compensatory, and $500,000 in punitive, damages. The District Court thereafter granted the City's motion for judgment as a matter of law, but rejected Respondents' motion for judgment as a matter of law based on qualified immunity. *See* Appendix D. Respondents again appealed the District Court's rejection of their claim to qualified immunity.[1]

On August 15, 2001, the Eleventh Circuit reversed in part and affirmed in part. *Willingham v. Loughnan*, 261 F.3d 1178 (11th Cir. 2001). Notwithstanding its conclusion that

> the law would allow a reasonable jury to find — given the Plaintiff's evidence, including evidence

1. Petitioner cross-appealed the judgment as a matter of law entered in favor of the City. Petitioner does not seek review of the Eleventh Circuit's decision affirming that judgment in this Court.

> of Plaintiff being unarmed when shot, of the nature of the weapons she had used and the manner of their use, of the number of police officers present and their location and so on — that the amount of force applied by the Defendant Officers was not reasonable in this case, notwithstanding that Plaintiff had just finished battering and attempting to kill police officers.

Id. at 1186, the Eleventh Circuit concluded that "[t]he Officer Defendants were entitled to qualified immunity under the facts supported by the evidence at the civil trial (taken most favorably to Plaintiff) but limited by the facts earlier determined conclusively by the criminal-trial court." *Id.* at 1184. The second appellate panel reached this conclusion despite finding that ". . . the verdicts in both the criminal-trial and in this case are general verdicts, the specific facts found by the juries are not available to us." *Id.* at 1183.

The Eleventh Circuit premised its qualified immunity analysis on whether "a materially similar case . . . already decided that what the police officer was doing was unlawful." *Id.* at 1187. Because "Plaintiff presents no earlier cases that would establish that the Officer Defendants' acts, under the circumstances, were clearly illegal at the time of this incident," *Id.*, it awarded the officers qualified immunity. Missing from the court's analysis was any mention of the prior interlocutory decision of the Eleventh Circuit, which concluded that "[i]f the officers fired on plaintiff even though she was posing no threat to anyone, they would have violated clearly-established law," *See* Appendix F, at 78a. Instead, the Eleventh Circuit assumed that qualified immunity draws *de novo* consideration irrespective of doctrines such as law-of-the-case.

On October 7, 2002, fifteen years to the day after the shooting of Betty Willingham, this Court vacated the August 15, 2001 opinion and remanded to the Court of Appeals for the Eleventh Circuit for further consideration in light of *Hope*, *supra*. Appendix B, 11a.

On February 18, 2003, the Court of Appeals for the Eleventh Circuit reaffirmed its earlier opinion stating that

> Plaintiff has pointed us to no case of the Supreme Court, Eleventh Circuit, or the Supreme Court of Florida which had already decided that the use of deadly force on a Plaintiff — (1) who had just attempted to murder one police officer and assaulted another, (2) who was not under police control, and (3) was close by a source of weapons- was unconstitutional.

Willingham v. Loughnan, 321 F.3d 1299, 1304 (11th Cir. 2003).

The Eleventh Circuit went on to state that since "[o]fficers facing split-second decisions in dangerous or life-threatening situations are seldom provided with fair warning, notice or guidance by a general requirement of 'reasonableness.' . . . 'Thus, if case law, in factual terms, has not staked out a bright line, qualified immunity *almost always* protects the defendant.'" (*Emphasis included*). *Id.* at 1303.

In making such a finding the Court of Appeals stated that Petitioner was shot ". . . within a split second of her assault on Loughnan and her attempt to kill Panucci, but while she was unarmed. She was also standing in the doorway to the kitchen where she had obtained the bottles and knife she had already thrown at the officers." *Id.* at 1301. The only

thing correct about this statement is that she was unarmed. A review of the criminal trial transcript and the civil trial transcript demonstrate that Respondents shot Petitioner out of anger, not fear. Throughout both the criminal and civil proceedings, Respondents falsely maintained that, at the time of the shooting, Betty Willingham, with a *second* knife in her hand, was lunging off the step towards Officer Panucci. The ability to rearm herself was never raised by them either to the jury, the district court or either appellate panel. In fact, Respondents were fully aware that their actions violated "clearly established" law as evidenced by their attempts to cover-up the shooting by planting a second knife under Petitioner's body, by giving false statements after conferring with each other immediately after the shooting, and by having cocaine sprinkled on her bloody gown to provide a basis for what they alleged were her "bizarre" actions. What the evidence demonstrated was that, at the time of the shooting, Petitioner posed a threat to no one. Both of her hands were firmly grasping her hair and she was shouting for them to stop the dog. There was adequate space and time for Respondents to assess the situation prior to shooting their weapons.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Standard, Which Requires That For Qualified Immunity To Be Defeated There Must Exist Previously Decided, Materially Similar Cases From This Court, The Eleventh Circuit Or The Supreme Court Of The State Contradicts This Court's Fair Warning Standard And The Approaches Of The Other Circuits.

In reaffirming its earlier opinion, the Court of Appeals stated that "[d]ecisions of this Court before the Supreme Court's *Hope* decision demonstrate that the law of the Circuit harmoniously complies with the Supreme Court's reminder." *Willingham*, 321 F.3d at 1302. It went on to state that since

> Plaintiff has pointed us to no case of the Supreme Court, Eleventh Circuit, or the Supreme Court of Florida which had already decided that the use of deadly force on a Plaintiff — (1) who had just attempted to murder one police officer and assaulted another, (2) who was not under police control, and (3) was close by a source of weapons — was unconstitutional.

Id. at 1304. Application of qualified immunity in the Eleventh Circuit continues to mean that "only in exceptional cases will government actors have no shield against claims made against them . . ." *Lassiter v. Alabama University Board of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc). *See also Willingham*, 321 F.3d at 1302; *Jenkins v. Talladega City Bd. Of Educ.*, 115 F.3d 821, 825 n.3 (11th Cir. 1997); *Gonzalez v. Lee Cty. Housing Auth.*, 161 F.3d 1290, 1295 (11th Cir. 1998). Under the standard promulgated by the

Eleventh Circuit, "[f]or qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for ever like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." *Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1280 (11th Cir. 2002) (quoting *Lassiter*, 28 F.3d at 1150); *Willingham*, 261 F.3d at 1184. In the Eleventh Circuit, even arguable differences in minor facts are enough to defeat liability. *Marsh v. Butler County*, 268 F.3d 1014, 1032 (11th Cir. 2001). "'Thus, if case law, in factual terms, has not staked out a bright light, qualified immunity *almost always* protects the defendant.'" (Emphasis included). *Willingham*, 321 F.3d at 1303, citing to *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997). Consequently, patent wrongs can be insulated by minor factual distinctions. *See Lewis v. McDade*, 250 F.3d 1320, 1322 (11th Cir. 2001) (Barkett, J., dissenting, from denial of rehearing en banc). Only where there is a pre-existing, "factually defined" case which is precisely on point and has been previously decided by this Court, the Eleventh Circuit or the supreme court of the state can a litigant survive the defense of qualified immunity before the Court of Appeals for the Eleventh Circuit. *Willingham*, 321 F.3d at 1304.

Following remand from this Court, the Eleventh Circuit, in its amended decision, stated that "Plaintiff cited several cases she claimed clearly established the law in these circumstances. None of these cases were close to this one in time or fact." *Id.* In making such a determination, the Court of Appeals ignored both its own precedent, as well as this Court's dicta. *See Tennessee v. Garner*, 471 U.S. 1 (1985), *McKinney v. Dekalb County*, 997 F.2d 1440 (11th Cir. 1993); *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500-02 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115, 106 S. Ct. 1970, 90

L. Ed. 2d 654 (1986); *Samples v. City of Atlanta*, 846 F.2d 1328 (11th Cir. 1988); *Clark v. Beville*, 730 F.2d 739 (11th Cir. 1984); *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985); *Vasquez v. Metropolitan Dade County*, 968 F.2d 1101 (11th Cir. 1992).

In reaching its conclusion, the second panel of the Court of Appeals ignored much of the evidence considered by the civil jury, evidence which did not conflict with the findings of the criminal jury. The second appellate panel did this despite the fact that it is bound by the jury's resolution of disputed factual issues in assessing a qualified immunity defense. *Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1147 (9th Cir. 1996); *Karnes v. Skrutski*, 62 F.3d 485, 491 (3d Cir. 1995); *Posr v. Doherty*, 944 F.2d 91, 95-96 (2d Cir. 1991); *Frazell v. Flanigan*, 102 F.3d 877, 886 (7th Cir. 1996).

The second panel of the Court of Appeals for the Eleventh Circuit narrowly reset the parameters of the civil jury's findings of facts, ignoring the totality of the evidence considered by the jury and posed for itself the unreasonably limited query: Whether Defendant officers would know in 1987 that shooting a woman within a "split second" after she had attacked two officers would violate her constitutional rights. *Willingham*, 321 F.3d at 1304. The jury, quite reasonably did not see it that way, and the second panel of the Eleventh Circuit was wrong to usurp the role of a reasonable fact finder, the jury.

The question, restructured in this way, ignores Petitioner's evidence, considered by the civil jury, of Respondents' efforts to conceal their wrong-doing by planting a throw-down weapon, that being another knife, under her

injured body and later sprinkling cocaine on her bloody gown while it was in the evidence room. The Eleventh Circuit's revised summary of the facts also ignores the independent eye-witness evidence that Petitioner was not threatening any of the officers at the time she was shot. The evidence also demonstrated that Respondents had attempted to preclude this testimony when they threatened eyewitnesses at scene of the shooting, at gunpoint, telling them to leave and not say anything.

It also ignored Petitioner's testimony that, after being shot, and while she was lying bleeding on her kitchen floor, she had asked Respondent Loughnan: "Why did you shoot me?" In response, Respondent standing over her fallen body stated, "If I had the opportunity, I'd shoot your ass again." Thus, the totality of the evidence, considered by the civil jury and ignored by the Eleventh Circuit, demonstrates that Respondents shot in anger, not fear.

The officers' conduct was not objectively reasonable under the circumstances, as the officers were fully aware that Petitioner did not pose a serious threat to them at the time of the shooting. The evidence considered by the jury also demonstrates that Respondents knew their actions, shooting an unarmed woman whose hands were raised, holding only her own hair, and who posed no threat, were unlawful at the time. Hence, they planted a second knife under her body so that they could claim she was armed and a danger to them. Because Respondents knew the law was clearly established that their conduct was unconstitutional, they claimed she lunged at them with a second knife. The eye-witnesses and physical evidence proved this to be a lie. Respondents threatened the eye-witnesses at gunpoint in an attempt to intimidate them into silence and later planted cocaine on

Petitioner's bloody gown to support another lie, that she was out of control on drugs. Had Respondents actually been reacting in the mistaken belief that Betty Willingham was advancing on them, dagger drawn, when they shot her, the simple truth would have sufficed. There would have been no need to plant evidence, intimidate witnesses and lie about what had occurred.

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Hope*, *supra* at 752. Respondents' own conduct of lies, planted evidence and a cover-up is clear evidence that they believed that they violated the law, notwithstanding Petitioner's analogous caselaw demonstrating the same. *See also Webster v. City of Houston*, 689 F.2d 1220 (5th Cir. 1982).

As the Court of Appeals for the Fourth Circuit stated in *Clem v. Corbeau*, 284 F.3d 543, 554 (4th Cir. 2002), "[t]he lack of more cases with similar facts is due to the clarity, rather than the ambiguity, of the Garner rule." In that case, the court noted other cases which are analogous to the instant case. *Id.* at 553. *See also Haddaway v. Ellerbusch*, 996 F.2d 1211 (4th Cir. 1993) (affirming denial of immunity to an officer who, when responding to 911 call, allegedly shot a large woman with history of violent behavior, who was "angry," holding a pair of scissors, and standing a few feet from the officer). "As the Seventh Circuit has observed in an analogous situation, *the absence of many similar cases 'demonstrates nothing more than widespread compliance with well recognized constitutional principles.' Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994)." (Emphasis added). *Clem*, *supra* at 554.

In their amended decision, the Eleventh Circuit confirmed its position that, in a qualified immunity analysis, it would only look at decisions from the Supreme Court, Eleventh Circuit, or the Supreme Court of Florida to determine if the law was clearly established. *Willingham*, 321 F.3d at 1304. According to the Eleventh Circuit, "[t]he Supreme Court decision in *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), *did not change the preexisting law of the Eleventh Circuit much*." (Emphasis added.) *Id.* at 1300.

In its most recent opinion, the Eleventh Circuit, instead of reconsidering its opinion in light of *Hope*, engaged in defensive posturing, concluding that, "[w]e have said that *preexisting, factually similar cases are* — not always, but (in our experience) *usually — needed* to demonstrate that officials were fairly warned that their application of force violated the victim's constitutional rights." (Emphasis added). *Id.* at 1303.

Thus, in its amended decision, the Eleventh Circuit repeated the same qualified immunity analysis after *Hope* as it had done before, demanding pre-existing, binding precedents "close to this one in time or fact," while disregarding decisional law from other jurisdictions. *Id.* at 1304. Moreover, the Court of Appeals replaced the civil jury's factual findings of disputed evidence with its own pared down version overlooking the fact that Respondents' own conduct of planting evidence, intimidating eye-witnesses and lies in the course of a cover-up demonstrated that they well knew the law prohibited their actions at the time of the incident.

In determining whether a constitutional right was clearly established, the Eleventh Circuit, alone, rigidly adheres to considering only decisions of the Supreme Court, the Eleventh Circuit, or the highest court of the state in which the case arose.

Hamilton v. Cannon, 80 F.3d 1525, 1532 n.7 (11th Cir. 1996); *D'Aguanno v. Gallagher*, 50 F.3d 877, 881 n.6 (11th Cir. 1995); *Jenkins*, *supra* at 830 n.5; *Willingham*, 261 F.3d; *Willingham*, 321 F.3d at 1304.

In *Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003), a case that was also on remand from this Court for reconsideration in light of *Hope*, the Eleventh Circuit reaffirmed its prior opinion concluding "that *Hope* does not dictate a change in the outcome of this case. We reinstate our prior decision in its entirety and supplement, by this opinion, our previous discussion of qualified immunity." *Id.* at 952. In that opinion, the Eleventh Circuit had held that "[t]he pre-existing law must 'truly compel (not just suggest or allow or raise a question about)' the conclusion that 'what defendant is doing violates federal law *in the circumstances*.'" (Internal emphasis). *Thomas v. Roberts*, 261 F.3d 1160, 1170 (11th Cir. 2001). The Eleventh Circuit went on to state that the "[l]aw can be clearly established in this circuit only by decisions of the U.S. Supreme Court, this court, or the highest court of the state from which the case arose." *Id.*

In its second (but not amended) decision in *Thomas*, the Eleventh Circuit noted that plaintiffs, citing to *Wilson v. Layne*, 526 U.S. 603, 617, 119 S. Ct. 1692, 1700 (1999), argued that "consensus or persuasive authority" from other circuits may create clearly established law, directing the court's attention to six analogous cases from other circuits. The Eleventh Circuit rejected that argument, reiterating that only Supreme Court cases, Eleventh Circuit decisions and caselaw from the Supreme Court of the state where the case arose can "clearly establish" law in the Eleventh Circuit. *Thomas*, 323 F.3d at 955.

Moreover, the Eleventh Circuit, citing to itself in *Marsh v. Butler County*, 268 F.3d 1014 (11th Cir. 2001) (en banc), stated that it did not understand *Wilson* to have held that a consensus of cases of persuasive authority would be able to establish law clearly. The rationale for this position is "[w]e do not expect public officials to sort out the law of every jurisdiction in the country." *Id.* at 1033 n.10; *see also Thomas*, 323 F.3d at 955. The Court in *Thomas*, *supra*, concluded, "[h]ence, Plaintiffs' argument based upon decisions in other circuits is foreclosed by our precedent." *Id.*

Similarly, in the recent case of *Vaughan v. Cox*, 316 F.3d 1210 (11th Cir. 2003), on remand from this Court for reconsideration in light of *Hope*, the Eleventh Circuit again reinstated its prior decision in its entirety and merely supplemented its previous discussion of qualified immunity.

The Honorable John T. Noonan, Jr., Circuit Judge, dissented on both occasions in *Vaughan* and expressed the absurdity of the Eleventh Circuit's insistence on looking only to its own jurisdiction for clearly established law. As Judge Noonan explained, "[I]t is difficult to discern why, if police officers in Tennessee and Minnesota and Connecticut were on notice that the use of lethal force to restrain a suspect is unreasonable, Georgia police officers should be supposed slow to have learned." *Vaughan*, 316 F.3d at 1215. Common sense dictates that, as recruits, and during ongoing training programs, police officers are taught the contours of clearly established law by those who make a thorough study of both federal and state law. Certainly, trainers of police officers and attorneys for municipalities and police officers know what is going on in other federal circuits other than their own. One would be hard put to find a single book, treatise,

law journal article, police advisory magazine or any other medium that, when discussing police misconduct under 42 U.S.C. § 1983, did not review caselaw throughout the United States.

Moreover, in his second dissent, Judge Noonan pointed out, that "[i]nvited to give 'further consideration' to Vaughan's case in the light of *Hope*, the majority comes to the same conclusion it reached before" (*Vaughan*, *supra* at 1214) and "[s]urely it is not for this court to preempt the jury and resolve all material facts in dispute against Vaughan." *Id.* at 1215.

All the other circuits agree with Judge Noonan that the law can be clearly established by decisional law from other jurisdictions. The Eleventh Circuit is alone in its position.

The Fourth Circuit properly followed this Court's opinion in *Wilson*, *supra*, stating that after looking to Supreme Court cases and controlling cases in its own jurisdiction, a "consensus of cases of persuasive authority" from other jurisdictions can be a source of clearly established law. *Trulock v. Freeh*, 275 F.3d 391, 407 (4th Cir. 2001); *Amaechi v. West*, 237 F.3d 356, 363 (4th Cir. 2001) (all citing to *Wilson*, *supra*.)

The First Circuit in *Savard v. State of Rhode Island*, 320 F.3d 34, 2003 WL 282421 (1st Cir. 2003), overturned the district court's qualified immunity analysis, as the lower court "failed to properly weigh relevant decisions from other circuits" and proceeded with its own analysis to determine whether the law was clearly established by its own cases, "as well as those from other circuits." *Id.* at 4.

The Second Circuit has stated that, "[d]ecisions of other circuits also may indicate whether the law was clearly established." *Varrone v. Bilotti*, 123 F.3d 75, 79 (2d Cir. 1997), citing to *Weber v. Dell*, 804 F.2d 796, 803-804 (2d Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987), (relying upon decisions of other circuits in making a qualified immunity determination). More recently, the Second Circuit has expressed some uncertainty as to the extent which case law from other circuits may be relied upon to determine whether the law was clearly established. *Poe v. Leonard*, 282 F.3d 123 (2d Cir. 2002). Nevertheless, that court decided to rely primarily on its own cases, but discussed other circuits' cases because they were found to be instructive. *Id.*

The Third Circuit, in the absence of a decision from that circuit answering the question of whether a right was clearly established, looks to other jurisdictions for a consensus of cases of persuasive authority. *Atkinson v. Taylor*, 316 F.3d 257 (3d Cir. 2003); *People of Three Mile Island v. Nuclear Regulatory Com'rs*, 747 F.2d 139 (3d Cir. 1984).

The Fifth Circuit has answered the exact question raised herein, whether the court is confined to precedent from its own circuit and this Court in determining if a right was clearly established. The Fifth Circuit, in agreement with the Fourth Circuit, finds authority in *Wilson*, *supra*, for looking beyond the Fifth Circuit and Supreme Court for precedent in determining what constitutes clearly established law. *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002). Quoting *Melear v. Spears*, 862 F.2d 1177 (5th Cir. 1989), the Fifth Circuit went on to state that,

> we will not rigidly define the applicable body of law in determining whether relevant legal rules

> were clearly established at the time of the conduct at issue. Relying solely on Fifth Circuit and Supreme Court cases, for example, would be excessively formalistic, but they will loom largest in our inquiries. In determining what the relevant law is, then, a court must necessarily exercise some discretion in determining the relevance of particular law under the facts and circumstances of each case, looking at such factors as the overall weight of authority, and the status of the courts that render substantively relevant decisions, as well as the jurisdiction of the courts that render substantively relevant decisions. *Id.* at 1185 n.8.

McClendon, *supra* at 328.

The Sixth Circuit has opined that, "[i]n inquiring whether a constitutional right is clearly established, we must 'look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits.'" (quoting *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993))." *Hamilton v. Myers*, 281 F.3d 520, 531 (6th Cir. 2002); *see also Thomas v. Cohen*, 304 F.3d 563, 580 (6th Cir. 2002); *Herbert v. City of St. Clair Shores*, 2003WL1194304, p. 10 (6th Cir. 2003).

The Seventh and Eighth Circuits agree that,

> [i]n order to determine whether a right is clearly established, it is not necessary that the Supreme Court has directly addressed the issue, nor does the precise action or omission in question need to have been held unlawful. In the absence of binding precedent, a court should look to all available

> decisional law, including decisions of state courts, other circuits and district courts.

Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995); *Norfleet v. Arkansas Dep't of Human Services*, 989 F.2d 289, 291 (8th Cir. 1993); *Buckley v. Rogerson*, 133 F.3d 1125 (8th Cir. 1998).

The Ninth Circuit agrees in almost identical terms. "[I]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established under the Harlow test." *Accord Bilbrey v. Brown*, 738 F.2d 1462, 1466 (9th Cir. 1984). The available decisional law includes cases from state courts, other circuits and district courts." *Newell v. Sauser*, 79 F.3d 115 (9th Cir. 1996); *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989); *Malik v. Brown*, 71 F.3d 724 (9th Cir. 1995); *Vaughan v. Ricketts*, 859 F.2d 736, 739 (9th Cir. 1988).

The Tenth Circuit agrees. "The law is clearly established when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as plaintiff maintains." *Farmer v. Perrill*, 288 F.3d 1254, 1259 (10th Cir. 2002); *Roska v. Peterson*, 304 F.3d 982 (10th Cir. 2002).

Finally, in *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C. Cir. 2001), in addressing the second prong of the *Wilson* test, whether the law was sufficiently clear that a reasonable officer would understand that what he was doing violated a constitutional right, the court stated it "must determine whether the Supreme Court, the District of Columbia Circuit, and, to the extent that there is a consensus,

other circuits have spoken clearly on the lawfulness of the conduct at issue." *See also Kalka v. Hawk*, 215 F.3d 90, 99 (D.C. Cir. 2000).

Thus, only the Eleventh Circuit demands precedent from its own jurisdiction and refuses to acknowledge the authority of its sister courts in any meaningful way. All Federal circuit courts in 1983 cases involving qualified immunity are interpreting the same United States Constitution. Justice cannot be served by tolerating unconstitutional conduct by a police officer in Grand Bay, Alabama because the law was not clearly established in the Eleventh Circuit when, by stepping a few yards across the state line into Missala, Mississippi, there was fair warning that the identical conduct had been declared unconstitutional by a "consensus or persuasive authority" from other circuits, as indicated by *Wilson*, *supra*, and adopted by the Fifth Circuit. It is Petitioner's belief that the Supreme Court's decision in *Wilson* controls this issue. The *Wilson* court suscinctly stated that a consensus of persuasive precedent can clearly establish legal principles for purposes of qualified immunity.

Moreover, the Eleventh Circuit is creating its own catch-22 situation by refusing to set precedents, excluding precedents from other jurisdictions and, despite the Supreme Court's ruling in *Hope*, maintaining that "*preexisting, factually similar cases are* — not always, but (*in our experience*) *usually* — *needed* to demonstrate that officials were fairly warned that their application of force violated the victim's constitutional rights." (Emphasis added). *Willingham*, 321 F.3d at 1303.

The second panel, with "reluctance and doubt," accepted the findings of the jury in this matter. *Willingham*, 261 F.3d

1178, 1186 (11th Cir. 2001). The importance of this fact cannot be overemphasized. Having agreed with the jury's findings, and having expressed its displeasure with the jury verdict, the second panel of the Eleventh Circuit, in direct conflict with the first panel, created an unreasonable query to justify providing qualified immunity to these Respondents. The query of the first panel, "[i]f the officers fired on plaintiff even though she was posing no threat to anyone, they would have violated clearly-established law" was entirely appropriate. Appendix F, 78a.

> When a qualified immunity defense is pressed after a jury verdict, the evidence must be construed in the light most hospitable to the party that prevailed at trial. See *Thompson v. Mahre*, 110 F.3d 716, 721 (9th Cir. 1997); *Karnes v. Skrutski*, 62 F.3d 485, 494 (3d Cir. 1995); *Posr v. Doherty*, 944 F.2d 91, 95-96 (2d Cir. 1991). One difference is that, in such an exercise, deference should be accorded to the jury's discernible resolution of disputed factual issues. See *Frazell v. Flanigan*, 102 F.3d 877, 886 (7th Cir. 1996).

Iacobucci v. Boulter, 193 F.3d 14, 23 (1st Cir. 1999).

In a qualified immunity defense after an adverse jury verdict, the Second District stated,

> [i]t was entirely proper, however, for the District Court to submit disputed factual questions to the jury, reserving for itself the ultimate legal question of the defense's availability. See *Finnegan v. Fountain*, 915 F.2d 817, 821 (2d Cir. 1990); *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir.),

> cert. denied, 498 U.S. 967, 112 L. Ed. 2d 414, 111 S. Ct. 431 (1990). Since a reasonable jury could find that reasonable officers, in defendants' position, would not have believed they were acting lawfully, the District Court properly found the defense of qualified immunity unavailable.

King v. Macri, 993 F.2d 294, 299 (2d Cir. 1993).

This Court has similarly ruled that

> the court must review all of the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence. The latter functions, along with the drawing of legitimate inferences from the facts, are for the jury, not the court. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.

(Citations omitted.) *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135 (2000).

It is clear from the opinions in the instant case, that the Eleventh Circuit failed to comply with this Court when analyzing the record. The Eleventh Circuit, by redefining the proven facts, has established a de facto method for circumventing the obvious intent of this Court. By selecting almost exclusively those facts which favor the moving party as "proven," the Court of Appeals has effectively found a way to create factual differences which skirt around the qualified immunity issue and undermine the authority of this Court.

II. The Eleventh Circuit's Rejection Of The Law-Of-The-Case Doctrine In The Specific Context Of Qualified Immunity Conflicts With This Court And Other Circuit Courts.

The law-of-the-case doctrine generally protects judicial findings of fact and law from subsequent review by the same court. "Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation." *Aguilar v. Agostini*, 521 U.S. 203, 236 (1997) (citing *Messenger v. Anderson*, 225 U.S. 436 (1912)). The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice," *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983), "although as a rule courts should be loathe to do so in the absence of extraordinary circumstances . . ." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988). *See* generally 18B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4478 (2002) ("The standards announced for departing from the law of the case commonly demand strong justification.")

A case involving multiple appeals presents the ideal model for applying the law-of-the-case doctrine. Multiple appeals often draw different collections of judges to the same legal and factual problems. In the absence of the law-of-the-case doctrine, a subsequent (and likely different) appellate panel would be free to second-guess the findings and holdings of prior panels. This would not only prove grossly inefficient, it would reflect a lack of comity between and respect for judges sitting on the same court. The better and common practice — that is reflected in the law-of-the-case doctrine — is for subsequent appellate panels to defer to the findings and holdings of prior panels. Their rulings become the "law of the case."

Lower courts have had little difficulty applying the law-of-the-case doctrine to insulate government officials from liability. A prior appellate panels' award of qualified immunity is routinely respected under the law-of-the-case doctrine by a subsequent appellate panel. *See, e.g., Tonkovich v. Kansas Board of Regents*, 254 F.3d 941 (10th Cir. 2001) (finding that prior appellate award of qualified immunity represents the law of the case); *Veneklase v. City of Fargo*, 248 F.3d 738 (8th Cir. 2001) (same).

Lower court judges, however, have struggled with the law-of-the-case doctrine when a prior panel has ruled against qualified immunity. On one hand, the United States Court of Appeals for the District of Columbia, the Third and the Sixth Circuits have concluded that generally applicable law-of-the-case principles apply to prior rejections of qualified immunity. *See, e.g., Kimberlin v. Quinlan*, 199 F.3d 496, 500-02 (D.C. Cir. 2000) (holding that prior rejection of qualified immunity by district court, affirmed on appeal, reflected the "law of the case"); *In re City of Philadelphia*, 158 F.3d 711 (3d Cir. 1998); *McCloud v. Testa*, 97 F.3d 1536, 1562 (6th Cir. 1996) ("It is also the law of the case that Testa's argument that he is entitled to qualified immunity because the plaintiffs were affiliated with a non-ideological faction within the same political party has been rejected."). The Eleventh Circuit, on the other hand, has refused to appropriately apply the law-of-the-case doctrine to prior rejections of qualified immunity. In *Oladeinde v. City of Birmingham*, 230 F.3d 1275 (11th Cir. 2000), for example, the court refused to recognize *two* prior panel decisions rejecting qualified immunity as the law of the case. The first followed an interlocutory appeal from a denial of the defendants' Rule 12(b)(6) motion. The second followed an interlocutory appeal from the District Court's denial of

defendants' motion for summary judgment. Neither panel decision, according to the Eleventh Circuit, represented the law of the case.

In the case at hand, the Eleventh Circuit observed that a prior panel "in an unpublished opinion — affirmed the denial of qualified immunity on interlocutory appeal [from a denial of summary judgment] in September 1997." *Willingham*, *supra* at 1180. Remarkably, it failed to even mention whether this prior panels' conclusion might constitute the "law of the case."

The refusal of the first appellate panel in this case to heed Respondents' claim of issue preclusion does not alter the obvious relevance of the law-of-the-case doctrine. First, as explained by that panel, the Respondents were responsible for not properly preserving the matter. *See* Appendix F, at 78a ("the [Respondents] did not present the criminal trial transcript to the district court in support of their motion for summary judgment, nor did they include said transcript in the record on appeal."). They thus waived using issue preclusion as a means of supporting their claim to qualified immunity. *Kimberlin*, *supra*.

> [A] 'legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.'

Id. at 500. Second, assuming it was not waived by Respondents in the first appeal, the question that ought to have been addressed by the second panel is whether the

preclusive effect of Petitioner's criminal conviction – not considered in the first appeal — amounted to "extraordinary circumstances" and thereby justified dispensing with the law of the case. *See Christianson*, *supra* at 817. *See generally* 18B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4478 (2002) ("The standards announced for departing from the law of the case commonly demand strong justification.").

In affirming the District Court's denial of summary judgment on the basis of qualified immunity, the initial panel of the Eleventh Circuit relied upon Petitioner's version of the relevant facts, stating that if it was proven that "she was shot when she was merely standing in the doorway of her house, screaming and pulling her hair and posing no threat to anyone" then the officers would have violated clearly-established law. Appendix F at 78a.

The exceptions to the law-of-the-case doctrine delineated in *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437 (11th Cir. 1984), were neither considered by the court nor met.[2] The second appellate panel's demonstrated dislike of the jury verdict chose to relitigate an issue that was already the law of the case. *See* Appendix F. Hence, after surmising what facts both the criminal and civil juries 'might have' or 'must have' found, without the benefit of any written interrogatories or special verdicts, which were not requested by Respondents, the second panel summarily minimized the relevant facts that Petitioner was unarmed and posed no threat to the officers by adding, ". . . notwithstanding that Plaintiff had just finished battering and attempting to kill police officers."

2. When (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice.

Id. at 1186. Such an interpretation and distortion of the record on appeal ignored the criminal trial transcript, the civil trial, and the findings of the initial appellate panel.

In casting aside the initial appellate panel's decision that the law was clearly established, the second appellate panel also digressed from its own previous holdings on the law of the case doctrine.

> [T]he trial court and appellate court are governed by a prior appellate decision in the same case except when (1) new and substantially different evidence emerges at trial; (2) controlling authority has been rendered that is contrary to the previous decision; or (3) the earlier ruling was clearly erroneous and would work a manifest injustice if implemented. See *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984).

Riley v. Camp, 130 F.3d 958, 967 (11th Cir. 1997); *United States v. White*, 846 F.2d 678, 685 (11th Cir.), *cert. denied*, 488 U.S. 984, 109 S. Ct. 537, 102 L. Ed. 2d 568 (1988); *Flint Elec. Membership Corp. v. Whitworth*, 68 F.3d 1309 (11th Cir. 1995); *Stevens v. Gay*, 864 F.2d 113 (11th Cir. 1989); *Joshi v. Florida State University Health Center*, 763 F.2d 1227 (11th Cir. 1985); *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 253 F.3d 576 (11th Cir. 2001); *Barber v. International Brotherhood of Boilermakers*, 841 F.2d 1067 (11th Cir. 1988); *Heathcoat v. Potts*, 905 F.2d 367 (11th Cir. 1990); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094 (11th Cir. 1987); *Venn v. St. Paul Fire and Marine Ins. Co.*, 99 F.3d 1058 (11th Cir. 1996); *United States v. Robinson*, 690 F.2d 869, 872 (11th Cir. 1982).

"[A] decision of an appellate court at an earlier stage of the same proceedings represents the law of the case." *Joshi, supra* at 1231-32; *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985); *Wheeler, supra*, at 1440; *Gaines v. Dougherty County Board of Education*, 775 F.2d 1565 (11th Cir. 1985).

"[T]he doctrine applies to issues decided by necessary implication as well as those decided explicitly." *Piambino, supra* at 1120; *Wheeler, supra*; *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir.), *cert. dismissed*, 419 U.S. 987, 95 S. Ct. 246, 42 L. Ed. 2d 260 (1974); *Gaines, supra*; 10B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice para. 0.404[10] (2d ed. 1984). "The courts are bound not only by explicit findings, but by those matters decided by necessary implication." *Carpa v. Ward Foods, Inc.*, 567 F.2d 1316, 1319 (5th Cir. 1978), *Barber, supra*.

In affirming the district court's denial of summary judgment, the initial panel summarized the relevant alleged facts, appropriately in the light most favorable to Petitioner, the non-moving party, i.e., that Petitioner was unarmed and posing no threat to anyone at the time Respondents shot her, stating that if proven, Respondent officers "would have violated clearly established law". Appendix F. At trial, Petitioner successfully proved those facts to the jury. Whether explicitly or implicitly, the initial panel in the instant case had decided the issue of whether the law was clearly established. In relitigating and reframing the evidence in order to provide Respondents with qualified immunity, the second appellate panel for the Court of Appeals ignored that "findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial or on a later appeal." *Westbrook v. Zant*,

743 F.2d 764, 768 (11th Cir. 1984) (quoting *Dorsey v. Continental Casualty Co.*, 730 F.2d 675, 678 (11th Cir. 1984)). *See also DeLong Equipment Co. v. Washington Mills Elec. Min.*, 990 F.2d 1186, 1196 (11th Cir.), *amended*, 997 F.2d 1340, *cert. denied*, __ U.S. __, 114 S. Ct. 604, 126 L. Ed. 2d 569 (1993); *United States v. White*, *supra* at 684; *Burger King Corp. v. Pilgrim's Pride Corp.*, 15 F.3d 166 (11th Cir. 1994).

The exceptions to this doctrine, set out in *United States v. Robinson*, *supra* at 872 and endorsed by a vast consensus of Eleventh Circuit opinions, were neither addressed nor satisfied. In fact, the second exception requiring that a "controlling authority has been rendered that is contrary to the previous decision," supports the initial appellate panel opinion, not the subsequent opinions. The controlling authority would be this Court. This Court's recent opinion in *Hope* requiring "fair warning" and not "materially similar facts" reinforces the initial panel decision that the right was "clearly established." *Hope*, *supra* at 741. The jury and the trial court in this matter would certainly agree.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED FEBRUARY 18, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-4005

D.C. Docket No. 90-08156-CV-UUB

BETTY WILLINGHAM,

Plaintiff-Appellee-Cross-Appellant,

versus

JAMES LOUGHNAN, BRIAN BEUCLER,

Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(February 18, 2003)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before EDMONDSON, Chief Judge, BLACK and McKAY*, Circuit Judges.

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* Honorable Monroe G. McKay, United States Circuit Judge for the Tenth Circuit, sitting by designation.

Appendix A

EDMONDSON, Chief Judge:

The Supreme Court decision in *Hope v. Pelzer*, 122 S.Ct. 2508 (2002), did not change the preexisting law of the Eleventh Circuit much.[1] So, the result in this case, which is a case that has been remanded to us from the Supreme Court for reconsideration in the light of *Hope*, remains the same. We have reconsidered our previous decision. We conclude the law still demands that the individual defendants be protected by the defense of qualified immunity.

We — in our earlier decision, *Willingham v. Loughnan*, 261 F.3d 1178 (11th Cir. 2001) — resolved arguments of issue preclusion, which impacted on a correct reading of the facts. We concluded that, in the light of the facts that must have been determined by the criminal-jury trial and the facts that might have been found by this jury viewed with an eye most favorable to the Plaintiff, these events make up the pertinent circumstances:

> [T]hat Plaintiff obtained a number of objects from the kitchen and threw them at Panucci and Loughnan. She threw a glass at Loughnan, striking him in the shoulder; and then she picked up a knife in the kitchen and threw it at Panucci's back in an

1. The Supreme Court's decision in *Hope* definitely did change the law of the Circuit some. *Hope* is a case that passed through this Court on its way to the Supreme Court. Our Court concluded that the individual defendants were due qualified immunity. The Supreme Court decided that our Court had reached the wrong conclusion in the light of *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974). In cases like *Hope*, the law of the Circuit is not now what it was.

> attempt to kill him. She immediately thereafter raised her hands to her head and, at that time, was shot four times by each of the Officer Defendants. The shots were fired within a split-second of her assault on Loughnan and of her attempt to kill Panucci, but while she was unarmed. She was also standing in the doorway to the kitchen where she had obtained the bottles and knife she had already thrown at the officers.

Id. at 1185-86.

The Officer Defendants are entitled to qualified immunity for their acts unless they — given the circumstances — violated a "clearly established statutory or constitutional right[] of which a reasonable person would have known." *Hope*, 122 S.Ct. at 2515 (quoting *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982)). The Supreme Court has said that an official is entitled to "*notice* [his] conduct is unlawful," *Id.* (quoting *Saucier v. Katz*, 121 S.Ct. 2151, 2158 (2001)) (emphasis added), and to "'*fair warning*' that his conduct deprived his victim of a constitutional right." *Id.* (emphasis added). This notice or fair warning flows from the applicable law's being "clearly established" at the time of the official's alleged unlawful conduct.

"For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right.'" *Id.* (quoting *Anderson v. Creighton*, 107 S.Ct. 3034, 3039 (1987)) (emphasis added). The unlawfulness must have been apparent. *Id.* In many — if not most — instances, the apparency

of an unlawful action will be established by (if it can be established at all) preexisting caselaw which is sufficiently similar in facts to the facts confronting an officer, such that we can say every objectively reasonable officer would have been on "fair notice" that the behavior violated a constitutional right.

The Supreme Court in the *Hope* opinion stresses that preexisting caselaw with "materially similar" or "fundamentally similar" facts is not always necessary to give an official "fair warning" of unlawful behavior. *Id.* at 2516. "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Id.* General statements of the law contained within the Constitution, statute, or caselaw may sometimes provide "fair warning" of unlawful conduct:

> [G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.

Id. (quoting *United States v. Lanier*, 117 S.Ct. 1219, 1227 (1997)) (alteration in original) (internal quotation marks and citation omitted).[2] Officials sometimes can still receive

2. For a recent opinion discussing general statements of law and "fair warning" after *Hope*, see *Vinyard v. Wilson*, 311 F.3d 1340, 1349-53 (11th Cir. 2002).

"notice that their conduct violates established law even in novel factual circumstances." *Id.*

Decisions of this Court before the Supreme Court's *Hope* decision demonstrate that the law of the Circuit harmoniously complies with the Supreme Court's reminder. We have repeatedly acknowledged the possibility that a general statement of the law might provide adequate notice of unlawfulness in the right circumstances. For example, before the Supreme Court's decision in *Hope*, this Court *en banc* specifically stated that "general statements of law" were capable of giving fair warning of unconstitutional official behavior:

> We acknowledge that preexisting case law, tied to the precise facts, is not in every situation essential to establish clearly the law applying to the circumstances facing a public official so that a reasonable official would be put on fair and clear notice that specific conduct would be unlawful in the faced, specific circumstances. Some general statements of law are capable of giving fair and clear warning in some circumstances: the occasional "obvious clarity" cases per *Lanier.*

Marsh v. Butler County, Alabama, 268 F.3d 1014, 1031 n.9 (11th Cir. 2001) (internal citations omitted); *see also, e.g., Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 825 n.3 (11th Cir. 1997) (en banc) (stating "general principles of [decisional] law *can* provide fair warning" if constitutional rule applies with "obvious clarity" to circumstances facing defendant); *Lee v. Ferraro*, 284 F.3d 1188, 1199 (11th Cir.

2002) (recognizing exception to requirement for factually similar cases where conduct so clearly unlawful that preexisting caselaw unnecessary); *Rodriguez v. Farrell*, 280 F.3d 1341, 1350 n.18 (11th Cir. 2002) ("We very occasionally encounter the exceptional case in which a defendant officer's acts are so egregious that preexisting, fact-specific precedent was not necessary to give clear warning to every reasonable (by which we, in the qualified immunity context, always mean every objectively reasonable) officer that what the defendant officer was doing must be 'unreasonable' within the meaning of the Fourth Amendment."); *Skrtich v. Thornton*, 280 F.3d 1295, 1304 n.9 (11th Cir. 2002) ("[S]ome conduct is so obviously contrary to constitutional norms that even in the absence of caselaw, the defense of qualified immunity does not apply."); *Brent v. Ashley*, 247 F.3d 1294, 1303 n.10 (11th Cir. 2001) (noting general statements of law capable of giving fair warning to officials); *Priester v. City of Riviera Beach, Florida*, 208 F.3d 919, 926 (11th Cir. 2000) (stating conduct which lies at core of Fourth Amendment prohibition makes unlawfulness readily apparent without preexisting caselaw; defense of qualified immunity not allowed); *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997) (same). It is not news to us that official conduct may be so egregious that further warning and notice beyond the general statement of law found in the Constitution or the statute or the caselaw is unnecessary; when we first decided this case, we did not believe that precedents with materially similar facts are always needed to overcome the defense of qualified immunity.

The Supreme Court has said the Fourth Amendment permits only those applications of force by law enforcement as are "reasonable." *Graham v. Connor*, 109 S.Ct. 1865, 1871

(1989). "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' *Bell v. Wolfish*, 99 S.Ct. 1861, 1884 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case. . . ." *Id.* at 1872 (alteration in original).

We have said that preexisting, factually similar cases are — not always, but (in our experience) usually — needed to demonstrate that officials were fairly warned that their application of force violated the victim's constitutional rights. Officers facing split-second decisions in dangerous or life-threatening situations are seldom provided with fair warning, notice or guidance by a general requirement of "reasonableness." *See Priester*, 208 F.3d at 926 ("In the context of Fourth Amendment excessive force claims, we have noted that generally no bright line exists for identifying when force is excessive; we have therefore concluded that unless a controlling and materially similar case declares the official's conduct unconstitutional, a defendant is *usually* entitled to qualified immunity.") (emphasis added); *Smith*, 127 F.3d at 1419 ("A reasonable official's awareness of the existence of an abstract right, such as a right to be free of excessive force, does not equate to knowledge that *his* conduct infringes the right. Thus, if case law, in factual terms, has not staked out a bright line, qualified immunity *almost always* protects the defendant.") (second emphasis added) (internal quotation marks omitted); *see generally Marsh*, 268 F.3d at 1030-1033 (discussing standard of reasonableness and use of precedents).

Appendix A

The Supreme Court, in *Hope*, cautions against a "rigid gloss on the qualified immunity standard" that would require materially similar, preexisting cases in all circumstances when the qualified immunity defense is to be overcome. *Hope*, 122 S.Ct. at 2512. Such a "rigid gloss" would be in variance with the law of the Supreme Court and the law of this Circuit. We have denied qualified immunity in the absence of precedents with similar facts.

We have said, in the context of excessive force cases, that an official's conduct could run so afoul of constitutional protections that fair warning was present even when particularized caselaw was absent: "the official's conduct was so far beyond the hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution even without caselaw on point." *Priester*, 208 F.3d at 926 (internal quotation marks omitted and second alteration in original). And we, in the absence of particularized caselaw, have acted to deny qualified immunity to officials whose use of force clearly exceeded the "hazy border" surrounding acceptable force. *See Lee*, 284 F.3d at 1199 (denying qualified immunity — without particularized precedent — in excessive force case where officer slammed arrestee's head on car trunk after "she was arrested, handcuffed, and completely secured, and after any danger to the arresting officer as well as any risk of flight had passed"); *Slicker v. Jackson*, 215 F.3d 1225, 1232-33 (11th Cir. 2000) (denying qualified immunity — without particularized precedent — to officers who slammed arrestee's head into pavement, "even though he was handcuffed and did not resist, attempt to flee, or struggle with the officers in any way"); *Priester*, 208 F.3d at 927 (denying qualified immunity —

without particularized precedent — in excessive force case where officer "ordered and allowed his dog to attack and bite Plaintiff; threatened to kill Plaintiff when Plaintiff kicked the dog in an effort to resist the unprovoked attack; and let the dog attack Plaintiff for at least two minutes"); *Smith*, 127 F.3d at 1420 (denying qualified immunity — without particularized precedent — to officer who broke arm of unresisting arrestee).

The specific question before us here is whether, considering the pertinent facts, the Officer Defendants violated federal law that was already clearly established in 1987, by shooting Plaintiff within a "split second" after she attempted to kill one officer and assaulted another. In our earlier opinion, we considered and rejected the argument that, even in the absence of a case with materially similar facts, Fourth Amendment law fairly warned these officers that their conduct was clearly unlawful: this incident was no clearly egregious shooting that was far beyond the hazy border of acceptable force. *Willingham*, 261 F.3d at 1187 n.14. In accord with *Hope*, we have considered again whether, in the light of general constitutional rules on deadly force that had already been identified in the decisional law, this use of deadly force would have been seen as plainly unlawful by all objectively reasonable officers; and the answer is "no" given the circumstances, including that the shooting occurred within a split second of an attempted murder on a fellow officer. No general decisional rules applied with obvious clarity to these circumstances in such a way as to give fair notice that what these defendants were doing clearly violated federal

law. And, as was the situation with our earlier decision,[3] Plaintiff has pointed us to no case of the Supreme Court, Eleventh Circuit, or the Supreme Court of Florida which had already decided that the use of deadly force on a Plaintiff — (1) who had just attempted to murder one police officer and assaulted another, (2) who was not under police control, and (3) was close by a source of weapons — was unconstitutional.[4]

Our earlier conclusion remains unaffected by the Supreme Court's decision in *Hope*. We must still conclude the Officer Defendants are entitled to the defense of qualified immunity. We reinstate our prior opinion and judgment and supplement our earlier discussion of qualified immunity with this opinion.

SO ORDERED.

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3. "Our own survey of the case law indicates that in 1987 it was not clearly established that it constituted excessive force to shoot a person under the circumstances presented in this case." *Willingham*, 261 F.3d at 1187.

4. At our invitation, the parties submitted supplemental briefs on the impact of the Supreme Court's decision in *Hope* to this case. Plaintiff cited several cases she claimed clearly established the law in these circumstances. None of these cases were close to this one in time or fact.

APPENDIX B — ORDER OF THE SUPREME COURT OF THE UNITED STATES DATED OCTOBER 7, 2002

Supreme Court of the United States

No. 01-1693

BETTY WILLINGHAM,

Petitioner

v.

JAMES LOUGHNAN, ET AL.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Hope v. Pelzer*, 536 U.S. __ (2002).

IT IS FURTHER ORDERED that the petitioner Betty Willingham recover from James Loughnan, et al., Three Hundred Dollars ($300.00) for costs herein expended.

October 7, 2002

Clerk's costs: $300.00

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED AUGUST 15, 2001

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-4005

D.C. Docket No. 90-08156-CV-UUB

BETTY WILLINGHAM,

Plaintiff-Appellee-Cross-Appellant,

versus

JAMES LOUGHNAN, BRIAN BEUCLER,

Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(August 15, 2001)

Before EDMONDSON, BLACK and McKAY*, Circuit Judges.

EDMONDSON, Circuit Judge:

This case is mainly about qualified immunity and the deference afforded the findings of fact implicit in a general

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* Honorable Monroe G. McKay, United States Circuit Judge for the Tenth Circuit, sitting by designation.

jury verdict in favor of Plaintiff in a section 1983 suit, considering Plaintiff's earlier criminal conviction related to the same events that are the subject of the section 1983 suit. The Officer Defendants in their individual capacities appeal the district court's denial of their Motion for Judgment as a Matter of Law and their Motion for Remittitur. Plaintiff cross-appeals the district court's grant of the City's post-trial motion for judgment.

The Officer Defendants first argue that Plaintiff was precluded from asserting a claim for a Fourth Amendment violation because of her conviction for attempted second degree murder of a police officer during the incident in question. They next argue that Plaintiff lacked a cognizable section 1983 claim because of the rule established in *Heck v. Humphrey*, 114 S.Ct. 2364 (1994). The Officer Defendants argue, most substantively, that they are entitled to qualified immunity because their acts violated no clearly established law at the pertinent time.

We review the district court's decision on a Motion for Judgment as a Matter of Law de novo, taking the evidence presented to the jury in the light most favorable to the non-moving party.[1] *See Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir. 1999).

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1. In this case, materially different stories were presented to the jury by Plaintiff and Defendants. Because the jury, by general verdict, found for Plaintiff we will accept her version of events except to the extent that her testimony in this case calls into question the validity of her previous conviction for assault and attempted murder during this incident.

Appendix C

PROCEEDINGS BELOW

In October 1987, Plaintiff Betty Willingham ("Plaintiff") was shot by police officers during an incident outside of her home. Plaintiff was then convicted of attempted, second-degree murder of one of the police officers and of battery on another police officer there that night.

In 1990, Plaintiff filed suit against several defendants alleging a variety of state and federal claims. Defendants' motions for summary judgment in 1992 and 1995 were denied by the district court. The 1995 motion was denied on the grounds that material issues of fact remained in dispute which, if resolved in Plaintiff's favor, would deprive the Defendants of qualified immunity. This court — in an unpublished opinion — affirmed the denial of qualified immunity on interlocutory appeal in September 1997. *See Willingham v. Loughnan*, 124 F.3d 1299 (11th Cir. 1997)(Table).

The federal civil rights claims against Brian Beucler and James Loughnan (the "Officer Defendants") and the City of Boynton Beach (the "City") proceeded to trial.[2] The jury returned a verdict in favor of Plaintiff for $5,000,000.00 in compensatory damages against the Officer Defendants and the City, and $500,000.00 in punitive damages against each officer in his individual capacity. The Officer Defendants and the City filed motions for judgment as a matter of law, for a new trial and for remittitur. The district court granted

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2. The state law claims against the Officer Defendants and defendant police chief were voluntarily dismissed before trial.

the City's motion for judgment as a matter of law,[3] but denied the Officer Defendants' motions. The Officer Defendants now appeal the denial of their motion for judgment as a matter of law and motion for remittitur.[4] Plaintiff filed a cross-appeal of the judgment in favor of the City.

BACKGROUND

The facts in this case are disputed on many relevant details by the parties involved. The difficult question presented in this case is what findings of fact can a court determine a jury made when the jury by general verdict in the section 1983 suit found for Plaintiff — and therefore all facts and inferences supported by the evidence must be drawn favorably to Plaintiff — but, certain evidence presented in the civil case cannot (as a matter of law) be taken as fact because it contradicts findings of fact necessarily made by the earlier criminal-case jury when that jury found Plaintiff guilty — beyond a reasonable doubt — of attempted second degree murder and of battery on a police officer. We first

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3. We affirm the trial court's judgment for the City because, after our own review of the record and briefs, we agree that Plaintiff offered no evidence from which a reasonable jury could conclude that the City was on notice of the need to train or to supervise their officers better in the area of the use of force. *See Gold v. City of Miami*, 151 F.3d 1346, 1351 (11th Cir. 1998) ("[W]ithout notice of a need to train or supervise in a particular area, a municipality is not liable as a matter of law for any failure to train and supervise.")

4. The Officer Defendants make no argument on appeal that the district court erred in failing to grant them a new trial and do not request we overturn the district court's order denying them a new trial.

summarize the testimony of key witnesses to the events and will determine in our discussion of the case what facts must be taken as true because of the earlier conviction for assault and attempted murder.

Testimony of Plaintiff Betty Willingham

Plaintiff testified that she came to the door of her home on the night in question, responding to a knock on her door that woke her. When she opened the door, she saw her brother, Arnold Sims ("Sims"), near his truck and saw Officer Ronald Panucci ("Panucci") and his police dog out by the road in front of the house. Sims and Panucci were in an argument and were standing about six or seven feet from each other. While standing in the doorway, Plaintiff called other members of her family on the phone to tell them the police were harassing Sims.

Panucci then started moving toward Sims with the leashed dog. The confrontation between Panucci and Sims then became physical; Panucci said something, and the dog began to attack Sims. The dog began to bite Sims below the knee. Plaintiff found two bottles in her kitchen near the door and threw them at the dog, which was closer to her than Panucci or Sims. Although the bottles hit the dog, it would not stop biting Sims. Plaintiff then grabbed a knife in the kitchen sink and threw the knife at the dog. She said that she never had a second knife, that she never threw a glass at a police officer and that she never tried to throw anything at Panucci. Plaintiff never stepped completely out of the doorway. Plaintiff said that she saw Loughnan and another police car at some point before the shooting but did not hear anyone yelling at her.

Appendix C

Immediately after throwing the knife at Panucci, Plaintiff reached up to pull her hair in frustration while screaming for the dog to stop biting Sims. Just as she was reaching up, she was shot and fell back into the kitchen. Plaintiff says she was shot within a "split second" of throwing the knife.[5] After she was shot, one of the Officer Defendants told her, "If I had the opportunity, I'd shoot your ass again." Shortly thereafter, paramedics arrived and took her to the hospital.

Testimony of Officer Loughnan

Loughnan went to the scene of the pertinent events after receiving a radio call that Panucci had stopped a car and needed assistance. When Loughnan arrived, he saw that Panucci and Sims were near the house with Panucci's back to the door. The dog was at heel at Panucci's side. Plaintiff was out on the top stoop of her doorway, cursing at Panucci and telling him to leave Sims alone. Panucci and Sims were yelling at each other and then became engaged in physical struggle. Loughnan concentrated on Plaintiff because (having had some dog training in the military) he did not want to get between a dog and its target. Plaintiff then threw a bottle at Panucci, which bounced off the back of Panucci's leg or back. Loughnan then approached Plaintiff, and she threw a glass at him striking him in the shoulder.

Loughnan told Plaintiff she was under arrest. He grabbed her by her bathrobe to apprehend her. Plaintiff resisted, tearing

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5. No argument was made, nor was evidence presented that the Officer Defendants had knowledge that both were going to shoot Defendant. The evidence supports only a finding that the officers made simultaneous (but independent decisions) to shoot Plaintiff.

the garment and a necklace from her as she fled into the house and closed the door behind her. Loughnan could hear Plaintiff rummaging through drawers in the kitchen. At that point Loughnan moved away from the stoop and said he might have drawn his gun and held it by his side. Plaintiff reemerged from the house holding two knives. She threw one at Panucci that bounced off his leg or back. Loughnan began yelling repeatedly "drop the knife." Plaintiff turned and looked at Loughnan and saw the gun pointed at her. She then turned and lunged toward Panucci. Loughnan fired four bullets at Plaintiff, stopping her and spinning her around so that she fell in her doorway.[6] Loughnan was somewhere between two and six feet from Plaintiff.

Testimony of Beucler

Beucler was working with Officer Blum the night Plaintiff was shot. They went to the area where Panucci was trying to stop Sims after they heard the stop announced on the radio. They were aware at the time that Sims' truck had not stopped when directed to do so by Panucci. When Beucler and Blum arrived at the scene, a civilian car drove by and stopped. Blum approached the car to direct the occupants to move on.

Beucler was focused on Panucci and Sims. He could see that they were in an argument. The dog was sitting at Panucci's side. At some point, Beucler was close enough to the confrontation to put his hand on Sims's shoulder. Beucler

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6. Both Loughnan and Beucler fired two "double-taps" at Plaintiff. Officers are trained to fire a "double-taps" instead of a single shot. According to their training, a "double-tap" is considered one shot. No argument was made at trial or on appeal that the practice of shooting a "double-tap" itself constitutes excessive force.

saw Sims push Panucci, and Panucci respond by grabbing Sims. The dog then attacked Sims, but Beucler could not tell if the dog actually bit Sims. Beucler backed away from the struggle when the dog became involved.

While Beucler was getting involved with Sims and Panucci, he suddenly heard a voice yelling "drop the knife" several times. Beucler saw that neither Panucci nor Sims had a knife; so he looked around to where the sound was coming from and noticed, for the first time, Plaintiff on the stoop. He saw Plaintiff make a throwing motion and saw the knife kick up off the ground. But he did not see the knife hit Panucci. Beucler then saw that Plaintiff had another knife. She was moving toward Panucci's back with the knife raised. Beucler then fired four shots at Plaintiff. The shots stopped her forward motion, and she fell back into the doorway of the house.

Beucler ran up to Plaintiff to check on her condition. He saw the knife next to Plaintiff on the kitchen floor but did not touch the knife. Beucler said his total time at the scene before the shooting was no more than 75 seconds, and it was only a matter of "split seconds" between the time he heard Loughnan yelling "drop the knife" and his own firing on Plaintiff.

DISCUSSION

Issue Preclusion and *Heck v. Humphrey*

As a preliminary matter, we dispose of the Officer Defendants' arguments that Plaintiff has no cognizable section 1983 claim because of *Heck v. Humphrey*, 114 U.S. 2364 (1994), and that her section 1983 claim is precluded by collateral estoppel. Because the verdicts in both the criminal-trial and in this case

are general verdicts, the specific facts found by the juries are not available to us. But, after thorough review of the criminal-trial transcript provided to us, we conclude that whether the Officer Defendants' acts were reasonable under the circumstances was not necessarily determined by the criminal trial jury. Also, a finding of excessive force by the jury in this civil case does not necessarily call into question the validity of section 1983 Plaintiff's criminal conviction.

Although we conclude that neither *Heck* nor issue preclusion prevents Plaintiff's claims in this case, the doctrine of issue preclusion does operate to limit what facts we can accept were found by the jury in this civil case for the qualified-immunity decision. *See Allen v. McCurry*, 101 S.Ct. 411, 420 (1980) (rules of collateral estoppel apply to Section 1983 suits). With this idea in mind, we now turn to the decisive question: whether the district court erred in denying the Officer Defendants judgment as a matter of law on the basis of qualified immunity.

Qualified Immunity

In 1995, Defendant Officers moved for summary judgment on the grounds of qualified immunity. The district court determined that material issues of fact in dispute prevented a grant of summary judgment.[7] We affirmed the

7. Although this conclusion is what the court announced, this view of how qualified immunity works at the summary judgment stage is not exactly correct. What should have been said is, when plaintiff's view of the disputed facts was credited, defendants were simply not due qualified immunity under the specific facts of the (Cont'd)

district court's denial of summary judgment in a brief opinion specifically noting that we were not considering arguments based on issue preclusion or *Heck v. Humphrey.*[8] The case then proceeded to trial to resolve the material issues in dispute. After the jury's verdict for Plaintiff, Defendants filed their post-trial motions.

In denying the Officer Defendants judgment as a matter of law, the district court again said that whether the officers were reasonable in the use of force or entitled to qualified immunity turned "on issues of fact that were properly resolved by the jury." This decision was error. When the rules of law are enforced, Plaintiff cannot prevail in this case. The Officer Defendants were entitled to qualified immunity under the facts supported by the evidence at the civil trial (taken most favorably to Plaintiff) but limited by the facts earlier determined conclusively by the criminal-trial court.

The applicability of qualified immunity is a question of law to be decided by the court. *See Harrell v. Decatur County*, 22 F.3d 1570, 1578 (11th Cir. 1994) (Dubina, J., dissenting) *approved on rehearing* 41 F.3d 1494 (11th Cir. 1995). When a court considers whether or not a government official is entitled to qualified immunity, the specific facts of the case before the court are of critical importance; and the specific facts of the precedents are almost always very important as

(Cont'd)
case in the light of the clearly established law at the time. But we understood the district court's decision and affirmed it.

8. At the time a transcript of the criminal trial had not been provided to the district court, and the Officer Defendants had not yet presented some of these arguments to the district court.

well.[9] *See Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001) (determining whether right clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition"); *Anderson v. Creighton*, 107 S.Ct. 3034, 3040 (1987) (noting that pertinent qualified immunity question in probable-cause case is "fact-specific" question of whether reasonable official could have believed, in light of clearly established law, that official's behavior was lawful under circumstances); *Lassiter v. Alabama A&M University Bd. of Regents*, 28 F.3d 1146, 1150 (11th Cir. 1994) (*en banc*) (stating that "general propositions" have little to do with qualified immunity, and bright line that must be crossed to surrender qualified immunity "is not found in abstractions — to act reasonably, to act with probable cause, and so forth — but in studying how these abstractions have been applied in concrete circumstances") (quoting *Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir. 1989)); *see also Wilson v. Layne*, 119 S.Ct. 1692, 1700 (1999) (saying "the right allegedly violated must be defined at the appropriate level

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9. We note at this point that we have said that when the question of qualified immunity turns on specific questions of fact, the use of special verdicts or written interrogatories can be very helpful to a judge in determining the legal question of whether qualified immunity applies. *See Priester v. City of Riviera Beach*, 208 F.3d 919, 926 n.6 (11th Cir. 1999); *Cottrell v. Cadldwell*, 85 F.3d 1480, 1487 (11th Cir. 1996) (when Defendant requests written interrogatories or special verdicts, it is error for the district court to refuse to issue them to the jury). But Defendant Officers did not request, nor did the court use special verdicts or written interrogatories to determine, disputed issues of fact in this case. Therefore, all lawfully disputed factual issues and all reasonable inferences therefrom must be taken in the light most favorable to Plaintiff. *See Priester*, 208 F.3d at 925-26 n.3 (citing *Iacobucci v. Boulter*, 193 F.3d 14, 23 (1st 1999)).

of specificity . . ."). Therefore, when reviewing a district court's denial of a motion for judgment as a matter of law in a qualified immunity case, we must make certain assumptions about what facts the jury found in reaching its general verdict for Plaintiff. *See Priester*, 208 F.3d at 923 n.2.

Briefly stated, in the typical case where the jury reaches a verdict in the face of disputed issues of fact, we simply accept as true the version of facts for which evidence (if it was more than a scintilla) was presented by the party who won the jury verdict. But, under the law applicable in this case, the civil jury was not legally entitled to second-guess Plaintiff's conviction for attempted murder of officer Panucci and for battery of officer Loughnan.[10] Based on our review of the record from the criminal trial, we conclude that the jury in the earlier criminal case must have concluded, at the very least, (1) that Plaintiff threw a knife at Panucci, (2) that Plaintiff

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10. The district court instructed the jury with these words: "[t]he Court has taken judicial notice of, and, therefore, you are instructed as a matter of law, that plaintiff, Betty Willingham, was convicted of committing the felony of attempted second-degree murder of Officer Ron Panucci on October 7th, 1987. Under Florida law, this means that the jury in the criminal prosecution of Betty Willingham decided that the State of Florida had proven beyond a reasonable doubt that the plaintiff intended to cause the death of Ronald Panucci and the perpetration of an act imminently dangerous to another and evinced a depraved mind, regardless of human life, although without premeditation, and committed on overt act in furtherance of that attempt."

The court gave a similar instruction regarding the conviction for battery of Loughnan concluding "[y]ou must accept these convictions as established facts in your deliberations and may not reject them or otherwise question their validity."

did attempt to kill Panucci when she threw the knife at him, and (3) that she did strike Officer Loughnan by throwing a glass at him. And these facts must be taken as true and final when we decide what other facts are supported by the civil-trial evidence, taken in the light most favorable to Plaintiff.[11]

So, in the light of the facts necessarily and finally determined by the criminal-trial jury, the facts that might be properly found by the civil jury taking the evidence presented in the

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11. Actions arising under Section 1983 are subject to the rules of collateral estoppel. *See Allen v. McCurry*, 101 S.Ct. 411, 420 (1980). And the courts have applied issue preclusion either to dismiss entire section 1983 claims or to prevent introduction of evidence on a previously decided fact. *See Brown v. Hialeah*, 30 F.3d 1433, 1437 (11th Cir. 1994) (affirming district court's decision to preclude introduction of evidence that Plaintiff did not attempt to shoot Defendant after Plaintiff had already pleaded guilty to attempted murder of Defendant); *Simmons v. O'Brien*, 77 F.3d 1093, 1097 (8th Cir. 1996) (section 1983 claim alleging excessive force leading to coerced confession was precluded by state court decision that confession was voluntary).

When considering whether to give preclusive effect to a state court judgment, we apply the estoppel rules of the state that rendered the judgment. *See Marrese v. American Acad. of Orthopaedic Surgeons*, 105 S.Ct. 1327, 1332 (1985); *Vazquez v. Metropolitan Dade County*, 968 F.2d 1101, 1106 (11th Cir. 1992).

In Florida, collateral estoppel may be employed to bar prosecution or argumentation of an ultimate fact or facts necessarily decided in the prior proceeding. *See State v. Strong*, 593 So.2d 1065, 1067 (Fla. DCA 4th 1992); *United States v. DeMarco*, 791 F.2d 833, 836 (1986). Florida also allows Defendants in a later civil suit to make use of defensive collateral estoppel even though they were not a party to the earlier criminal proceeding. *Zeidwig v. Ward*, 548 So.2d 209 (Fla.1989).

light most favorable to the Plaintiff, are that Plaintiff obtained a number of objects from the kitchen and threw them at Panucci and Loughnan.[12] She threw a glass at Loughnan, striking him in the shoulder; and then she picked up a knife in the kitchen and threw it at Panucci's back in an attempt to kill him. She immediately thereafter raised her hands to her head and, at that time, was shot four times by each of the Officer Defendants. The shots were fired within a split-second of her assault on Loughnan and of her attempt to kill Panucci, but while she was unarmed. She was also standing in the doorway to the kitchen where she had obtained the bottles and knife she had already thrown at the officers.

The question for the purposes of qualified immunity is this one: whether Defendant Officers violated clearly established federal law in 1987, by shooting Plaintiff within a "split second" after she attacked two officers — having just tried to kill one of them — while she, at the moment, was not in the physical control of the police and was standing unarmed but near the area from which she had already obtained four objects she had used as weapons, at least one of which was a potentially lethal weapon.

The Supreme Court has recently offered guidance on how to address properly the question of qualified immunity in

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12. We recognize and have considered Plaintiff's highly successful impeachment of the officers' testimony in this case. Because of these efforts, we understand that the civil jury was at liberty to believe very little of the Officer Defendants' side of the story. The facts recited here, therefore, are taken from those facts we conclude were finally determined by the criminal-trial jury, plus Plaintiff's own civil-trial testimony, and other undisputed evidence in the civil trial.

the context of excessive force cases. In *Saucier*, the Court decided that whether an officer behaved in an objectively reasonable manner in the context of the merits of the excessive force claim is a completely separate and distinct question from whether the officer behaved objectively reasonably under the clearly established preexisting law for qualified immunity purposes. *See* 121 S.Ct. at 2158-59.[13]

Deadly force is permitted under the Fourth Amendment when an officer "has probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or others." *Tennessee v. Garner*, 105 S.Ct. 1694, 1701 (1985). The test for whether excessive force is used is an objective test asking whether a reasonable officer would believe that this level of force is necessary in the situation at hand. *See Graham v. Connor*, 109 S.Ct. 1865, 1872 (1989). Most important, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id.* We have also said that "[f]rom the vantage point of an officer whose life is jeopardized, a potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression, and death." *Menuel v. City of Atlanta*, 25 F.3d 990, 995 (11th Cir. 1994).

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13. *Saucier* directly rejects Plaintiff's main argument that a finding of excessive force precludes the qualified immunity defense. That Defendants' conduct has been ultimately determined to be unreasonable under the excessive force analysis does not decide whether the law was already clearly established at the time Defendants acted that what they were doing, given the circumstances, necessarily violated federal law.

Appendix C

We (with reluctance and doubt) accept that the law would allow a reasonable jury to find — given the Plaintiff's evidence, including evidence of Plaintiff being unarmed when shot, of the nature of the weapons she had used and the manner of their use, of the number of police officers present and their location and so on — that the amount of force applied by the Defendant Officers was not reasonable in this case, notwithstanding that Plaintiff had just finished battering and attempting to kill police officers. *See Fitzgerald v. McDaniel*, 833 F.2d 1516, 1519 (11th Cir. 1987) (a jury's assessment of the reasonableness of a police officer's conduct is a factual finding by which the court is bound unless appellant can show an absence of probative facts to support the finding).

The crucial inquiry, however, is whether the law was already clearly established at the time of the incident that the use of deadly force was unlawful under the particular circumstances faced by the officers in this situation. An officer is entitled to qualified immunity if a reasonable officer, under the circumstances, might have thought that the use of force did not violate the federal law at the time of the incident. *See Saucier*, 121 S.Ct. at 2158-59. The principles and goals of the doctrine of qualified immunity are particularly important in cases like this one: where police officers are confronting an unpredictable and dangerous situation in which split-second decisions can make the difference between life and death.

Qualified immunity protects from suit all but the plainly incompetent or one who is knowingly violating the federal law. *Lassiter*, 28 F.3d at 1149. Government officials are not

required to err on the side of caution. *See Davis v. Scherer*, 104 S.Ct. 3012, 3020 (1984). And qualified immunity recognizes "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz v. Economou*, 98 S.Ct. 2894, 2911 (1978).

Police officers cannot be expected to delay or to second-guess decisions that must be made in the heat of a dangerous confrontation with a person engaged in violent criminal conduct. Whatever the evidence at the civil trial also shows — given the fact of Plaintiff's 1992 criminal convictions — the factual situation confronted by the Officer Defendants in this case must be basically this one: 1) Plaintiff had just assaulted one officer, attempted to kill another officer; 2) she was not subdued; and 3) she was standing in the door to the kitchen where she had, just moments before, obtained weapons with which she had tried to kill one police officer and assaulted another. Unless the federal law in October 1987 was already clearly established that — under these circumstances — shooting Plaintiff, even if she was unarmed at the moment, did constitute excessive force in violation of the Fourth Amendment, the Defendant Officers are entitled to qualified immunity.

Almost always, to establish the law clearly in the context of the Fourth Amendment, a materially similar case must have already decided that what the police officer was doing was unlawful. *See Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000) ("[N]o bright line exists for identifying when force is excessive; we have therefore concluded that unless a controlling and materially similar

case declares the official's conduct unconstitutional, a defendant is usually entitled to qualified immunity.")[14] Plaintiff presents no earlier cases that would establish that the Officer Defendants' acts, under the circumstances, were clearly illegal at the time of this incident. Our own survey of the case law indicates that in 1987 it was not clearly established that it constituted excessive force to shoot a person under the circumstances presented in this case. Moreover, as recently as 1995, we concluded an officer was entitled to qualified immunity for shooting in 1990 an unarmed man who had just attacked the police officer with a flashlight and had then returned to the man's car. *See Harrell*, 22 F.3d at 1581 (Dubina, J., dissenting) *approved on rehearing* 22 F.3d 1494.

Because the federal law was not already clearly established law in 1987 that it constituted excessive force in violation of the Fourth Amendment to shoot a person under the circumstances presented in this case, we conclude that the Defendant Officers are entitled to qualified immunity.

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14. We also noted in *Priester* that there is a narrow exception to the requirement for materially similar cases when the officer's conduct falls "so far beyond the hazy border between excessive and acceptable force." But, this case, where the police fired within a split second of an attempted murder on one of them, is no such case.

Appendix C

CONCLUSION

Because we have concluded that the Officer Defendants are entitled to the defense of qualified immunity, it is unnecessary for us to reach the question of remittitur. For the Officer Defendants, the district court's judgment is REVERSED. For the City, the district court's judgment is AFFIRMED.

REVERSED IN PART and AFFIRMED IN PART.

APPENDIX D — CORRECTED OMNIBUS ORDER ON POST-TRIAL MOTIONS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED NOVEMBER 30, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-8156-CIV-UNGARO-BENAGES

BETTY WILLINGHAM,

Plaintiff,

vs.

CITY OF BOYNTON BEACH, et al.,

Defendants.

CORRECTED OMNIBUS ORDER ON POST-TRIAL MOTIONS

THIS CAUSE is before the Court upon the post-trial Motions filed by Defendants in this matter on April 28, 1998, which are as follows: the City of Boynton Beach's ("the City") Motion for Judgment as a Matter of Law (DE - 283), James Loughnan's ("Loughnan") and Brian Beucler's ("Beucler") Motion for Judgment as a Matter of Law (DE - 285), Defendants' Motion for New Trial (DE - 293), and Defendants' Motion for Remittitur (DE - 289).

THE COURT has considered the Motions, responses and replies, has conducted a thorough review of the record, and

is otherwise fully advised in the premises. Except for the issues discussed below, the Court disposes of the Motions by adopting the rulings made before or during the trial.[1]

I. *BACKGROUND*

In this case, the jury considered Plaintiff Betty Willingham's ("Plaintiff" or "Willingham") claim under 42 U.S.C. § 1983 that Defendants violated her Fourth Amendment right to be free from the use of excessive force when, on October 7, 1987, she was shot eight times by Defendants Loughnan and Beucler, sworn officers of the City of Boynton Beach Police Department ("BBPD"). As to the City, the jury considered Plaintiff's claim that the City was deliberately indifferent to her safety by failing to properly train and supervise Defendants Loughnan and Beucler in the use of deadly force. The jury also considered Defendants Loughnan's and Beucler's defense that they were constitutionally justified in the use of deadly force against Plaintiff because at the time Plaintiff was shot,

1. Specifically, each of the issues raised in Defendants' Motion for New Trial, with the exception of their argument that the verdict returned by the jury is excessive, were fully considered and disposed of either before or during the trial. Therefore, the undersigned adopts her respective rulings made during trial. Because the Court is setting aside the verdict against the City, the argument that the verdict is excessive, raised both in the Motion for New Trial and the Motion for Remittitur, is only relevant with respect to the compensatory and punitive damages awarded against Officers Loughnan and Beucler. Having considered the arguments of counsel, the undersigned finds that the damage awards are not excessive and that the awards do not shock the conscience of the Court. *See Smith v. Wade*, 461 U.S. 30 (1983); *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435 (11th Cir. 1985). Thus, Defendants' Motions for New Trial and for Remittitur are denied.

she was attempting to kill their fellow officer, Ronald Panucci, as evidenced by the fact that Plaintiff was subsequently charged and convicted of attempted second degree murder of Panucci. After eleven days of trial, the jury returned a verdict of $5,000,000 against Defendants and punitive damage verdicts of $500,000 each against Loughnan and Beucler.

The Incident

The underlying incident began with a violent confrontation between Arnold Sims, who is Willingham's brother, and Panucci arising out of Panucci's intention to complete a traffic stop of Sims in the front yard of Willingham's house. Numerous other officers, including officers Loughnan, Beucler, Blum and Yanuzzi, arrived on the scene to assist Panucci. The testimony concerning what otherwise happened, which is summarized below, was disputed in nearly every respect as follows:

Officer Loughnan: Officer Loughnan testified that upon arriving at the Willingham residence he saw Willingham standing on the stoop of her house yelling and screaming. He then observed Willingham throw one bottle, which struck him on his shoulder, and then another bottle, which bounced off Panucci's back or leg. At that point, Loughnan informed Willingham that she was under arrest and he attempted to apprehend her in the doorway by grabbing her nightgown, but the garment came off in his hands along with a necklace that Willingham was wearing. Willingham then retreated into her home, slamming the door behind her. Loughnan, who could hear Willingham rummaging through the drawers in her kitchen, then took his gun out and held it down by his leg.

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Willingham reemerged on the stoop now holding two knives in her hand. She threw the first knife and it hit Panucci's back or the back of his leg. Then she lifted the second knife over her head as though she were about to throw it. Although Loughnan repeatedly yelled at her to drop the knife, she lunged at Panucci's back. At that time, to prevent her from stabbing Panucci, Loughnan shot her four times.

Officer Beucler: Officer Beucler testified that he arrived at the scene with his partner, Officer Blum. Initially Beucler observed Sims and Panucci exchanging heated words and also observed the police dog at Panucci's side, but soon thereafter Panucci and Sims got into a shoving match in which the police dog became "involved." As the scuffle ensued, Beucler suddenly heard Loughnan yell "drop the knife," which he repeated several times. At that point, Beucler saw Willingham on the stoop, saw her throw a knife with her right hand, and saw the knife "kick up off the ground."[2] He then moved within three to four feet of Willingham to position himself between her, Panucci, Sims and the dog. As he was taking up that position, he saw that Willingham had another knife in her hand and that she was moving off the stoop in his and Panucci's direction. Fearing for his and Panucci's life, he fired four rounds into Willingham. As a result of the shots, Willingham fell half in the doorway and half on the stoop.

Beucler was the first person to reach Willingham after she was shot and lying wounded half in the doorway and

2. Beucler testified that he could not tell if Willingham was throwing the knife at the dog, Panucci or Sims, that he did not see the first knife strike Panucci, and that he saw no bottles thrown.

half on the stoop. As Willingham was struggling to get up and Beucler could not see the second knife, he was concerned that she might try to stab someone. He then saw the knife under her body and decided to leave it there.

Other Officers

Sergeant Yanuzzi testified that on the night of the incident, he was the afternoon shift supervisor. At about 11:30 p.m., he was in the police station when he heard Panucci call for assistance and other officers respond to Panucci's call. At that point, Yanuzzi also responded to the Willingham residence. As he exited his vehicle, he saw Panucci engaged in a struggle with Sims and saw that Loughnan was also on the scene. In addition, Yanuzzi was aware of Willingham's presence because he could hear her yelling. As he attempted to pull Sims off of Panucci, he more or less simultaneously saw Willingham come onto the stoop and take a step down with a knife in her hand, and then heard shots fired.

Officer Panucci testified that he was a canine officer on the night of the incident, that he attempted to arrest Sims, that he and Sims became involved in a violent struggle, and that his dog attacked Sims. According to his testimony, he heard gunfire just as Sims and Yanuzzi fell to the ground. He further stated that when the shots were fired he sensed that Willingham was "off to his left" and somewhat behind him, that Willingham was moving toward him when she was shot, and that the shots must have been fired near him because some of the hot casings hit him. He never saw a weapon in Willingham's possession, nor did he see her take any threatening action.

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Officer Blum testified that on October 7, 1987, he was traveling with Beucler when they heard Panucci announce over the radio that he was attempting to make a traffic stop. As a result of hearing this, Blum and Beucler responded to the Willingham residence. They arrived simultaneously with Loughnan.

Officer Blum further testified that he initially saw Panucci and Sims in a struggle and Willingham yelling and screaming from the door to her kitchen, that he saw the dog bite Sims, and that he saw Plaintiff throwing bottles. He also stated that, although he heard Beucler or Loughnan yelling for Plaintiff to put down the bottles, at that point he could not see them. Immediately prior to the shooting he saw Plaintiff with a knife raised above her head pointing in a downward position and heard her say, "I am going to *** kill you." (expletive omitted).[3]

Betty Willingham: Betty Willingham testified that she went to bed around 9:00 p.m. on the night of October 7, 1987 because she planned to leave early for Atlanta the following morning, but was awakened when she heard her brother knock on her door and call her name. She grabbed her bathrobe and went to the door to see why he was knocking. As she opened the door she saw Sims, Panucci, and the dog, and she heard Sims and Panucci arguing. She asked Panucci what was the matter, to which he responded that it was none of her "mother *** business." (expletive omitted).

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3. Initially, Blum testified that he only saw the Plaintiff with a bottle in her hand.

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As Willingham stood in the doorway and reached for a nearby phone to call her mother, she saw Panucci and the dog approach Sims and back him against the wall of her house. At that point, Sims and Panucci began shoving each other, Panucci gave a command to the dog, and the dog began biting Sims. Fearing that the dog might kill her brother, she yelled at Panucci to "stop the dog" and began looking for something to throw at it. She threw two bottles "down at the dog" to try to make him stop biting her brother's leg. When the dog persisted, she reached inside her house for another bottle, and, finding one, she threw it. When she looked for something else to throw, she saw a knife in the sink, picked it up, and threw it down toward the dog. Through all of this, she remained in her doorway. When she threw the knife, Sims and the dog were between her and Panucci.

When Willingham could not find anything else to throw at the dog, she started pulling her hair with both hands and screaming for Panucci to "stop the dog." It was at that time that she was shot and fell backwards onto the kitchen floor. She testified that she never threw a glass and did not know how the knife came to be on the kitchen floor after she was shot. She denied that Loughnan had attempted to restrain her at any time, that he had pulled her nightgown off, that she was wearing a necklace, that she ever closed the door to her house, or that she ever heard anyone tell her to drop the knife. She did remember that one of the officers who approached her after she was shot told her, in response to her asking why she had been shot that if he had the opportunity, he would shoot her again. Willingham was shot eight times and, as a result, sustained serious and permanent injuries.

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Stanley Williams: Stanley Williams testified that he is one of Willingham's neighbors. On the night of October 7, 1987, after seeing flashing lights from his bedroom window, Williams walked toward Willingham's residence. Initially, as he was walking toward her house, he saw a dog and an officer and Sims having words. As he crossed the street he saw another police car pull up and two officers get out. At that point, all of the officers and the dog attacked Sims. During the attack, Willingham yelled "leave my brother alone," threw two objects that Williams believed were bottles at the police officers from her stoop, and then retreated into her house. Willingham then reemerged onto the stoop and threw something else in the direction of the officers. Either at this point or upon her retreating and reappearing on the stoop for a third time, the officers shot her in her kitchen doorway. After Willingham was shot, one of the officers on the scene ran over to him, pointed a gun at him and told him to get on the ground or he would "blow [his] *** brains out." (expletive omitted). After the police held Williams on the scene for fifteen minutes, he was told to "get." None of the investigating officers who came to the scene asked Williams for a statement, but that night Williams, on his own initiative, went to the police station and insisted upon making a statement because he believed that Willingham had been shot for no reason.

Investigation and Prosecution

Immediately after the shooting, Loughnan and Beucler were relieved of duty pending an investigation into the incident. In addition, representatives of the BBPD went to the scene to collect the physical evidence. Detective Ostazewski,

one of the crime scenes technicians, found the nightgown and necklace, but they were several feet away from the doorway where Loughnan claimed to have attempted to apprehend Willingham. The crime scene unit took measurements, photographs of the scene, and fingerprints of the various objects on the ground. Each of the objects tested negative for Willingham's fingerprints. The unit also collected blood evidence, casings and bullets, including the bullets extracted from Willingham's body at the hospital.

Other officers were assigned the task of interviewing the witnesses and the officers involved in the incident. Despite the fact that about thirty people had gathered on the street in response to the commotion, on the night of the incident Officer Connolly located only one civilian who was initially willing to give a statement at the police station, but who later refused when he found out his statement would be taped. While on the scene, Detective Baryl interviewed Loughnan and Beucler and took witnesses' statements from three persons from the neighborhood. Loughnan and Beucler also gave taped statements to Deputy Chief DeLoach two days after the incident. In the days following the incident, Lt. Galbraith of Internal Affairs, who had been assigned to present the incident to the Shooting Review Board, conducted additional interviews including interviews of Loughnan and Beucler.

On October 15, 1987, the Shooting Review Board (the "Board") convened to review the circumstances surrounding the shooting of Willingham. According to the memorandum of the proceedings, the Board reviewed all written material made available by Lt. Galbraith. The Board also interviewed Lt. Galbraith, Deputy Chief DeLoach, Sgt. Yanuzzi, Officer

Blum and Sgt. Ostazewski. The Board concluded that Loughnan and Beucler had acted in conformity with Florida Statute § 776.05 which authorizes the use of deadly force in defense of the life of a police officer, and that their use of deadly force did not violate any department policy relating to the use of deadly force. Subsequently, the local State Attorney convened a Grand Jury to consider whether Loughnan and Beucler had acted illegally when they shot Willingham. The Grand Jury also exonerated them.

As noted above, the Palm Beach County State Attorney later charged Willingham and tried her for attempted first degree murder of Panucci and battery on a law enforcement officer (Loughnan). At trial, Willingham asserted that she threw one knife and that she threw it in defense of her brother. Consequently, the jury was instructed on both Willingham's claim that she was legally entitled to defend her brother and on the circumstances under which law enforcement officers are legally entitled to use deadly force. The jury found her guilty of battery on Loughnan and guilty of attempted second degree murder of Panucci, a lesser included offense of attempted first degree murder.

II. *LOUGHNAN'S AND BEUCLER'S MOTION FOR JUDGMENT AS A MATTER OF LAW*

Loughnan and Beucler ("the Officers" or "Defendants") raise four grounds in support of their Motion: (1) the doctrines of collateral estoppel, judicial estoppel or issue preclusion; (2) *Heck v. Humphrey*, 512 U.S. 477 (1994); (3) insufficiency of the evidence; and (4) qualified immunity. The third and

fourth arguments have already been resolved by this Court, which rulings the Court adopts herein.[4]

In considering the remaining grounds for Defendants' Motion for Judgment as a Matter of Law, the Court is mindful that it must view all evidence in the light most favorable to Plaintiff as the non-moving party and draw all reasonable inferences in her favor. Moreover, the Motion should be denied if "there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions[.]" *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041 (11th Cir. 1989).

A. Collateral Estoppel or Issue Preclusion

The Court also has previously considered the Defendants' contention that Plaintiff was barred from relitigating whether the officers were justified in using deadly force because

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4. Specifically, with respect to the Officers' contention that they were justified in using deadly force and that such force was "objectively reasonable" under the circumstances, the Court maintains that this is an issue of fact that was properly resolved by the jury. The qualified immunity issue was raised prior to trial in the Officers' Motion for Summary Judgment. The Court denied that Motion on May 3, 1996 because genuine issues of material fact existed upon which the qualified immunity defense turned. The Officers took an immediate interlocutory appeal from the Court's Order which was affirmed by the Eleventh Circuit. Although the Officers properly and timely request that the Court revisit this factual issue, the Court still finds that the qualified immunity defense turns on issues of fact that were properly resolved by the jury. *See Cottrell v. Caldwell*, 85 F.3d 1480,1488 (11th Cir. 1996) The Court, however, addresses the collateral estoppel and *Heck v. Humphrey* issues herein.

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Plaintiff was convicted of attempted second degree murder of Officer Panucci (D.E. 94). However, at that time, Defendants either failed to supply or were unable to supply pertinent portions of the record of the criminal trial to the Court, and therefore, the undersigned held that Defendants had failed to establish that the issues of justifiable use of deadly force had been actually litigated and necessarily decided by the jury in the criminal case in reaching its verdict. As the parties have now been able to supply most of the transcripts from the criminal trial, the Court revisits the issue.

As this Court noted in its previous Order, when considering whether to give preclusive effect to a state court judgment, a federal court must apply the collateral estoppel rules of the state which rendered the judgment. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379-81 (1985); *Vazquez v. Metropolitan Dade County*, 968 F.2d 1101, 1106 (11th Cir. 1992). *See also* U.S. Const., art. IV § 1 (full faith and credit). Actions arising under 42 U.S.C. § 1983 are subject to the rules of collateral estoppel. *See Allen v. McCurry*, 449 U.S. 90,103-05 (1980). Thus, this Court must apply the collateral estoppel rules of the state of Florida to determine whether Willingham's conviction for attempted second degree murder estopped her § 1983 action.

In *Vazquez*, the Eleventh Circuit analyzed Florida's collateral estoppel law in light of the Florida Supreme Court's decision in *Zeidwig v. Ward*, 548 So. 2d 209 (Fla. 1989). *See Vazquez*, 968 F.2d at 1106-08. In *Zeidwig*, the Florida Supreme Court "approve[d] the use of defensive collateral estoppel to prevent a criminal defendant, as a plaintiff, from relitigating the same issue which has been litigated in prior

criminal proceedings." *Zeidwig*, 548 So. 2d at 209. Based on this holding, the Eleventh Circuit recognized the use of defensive collateral estoppel in a civil suit regarding a criminal verdict under Florida law. *See Vazquez*, 968 F.2d at 1106-07. Pursuant to *Zeidwig*, the Eleventh Circuit held that the federal standard for applying collateral estoppel announced in *Precision AirParts, Inc. v. Avco Corp.*, 736 F.2d 1499 (11th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985), is also applicable as a matter of Florida law. *See Vazquez*, 968 F.2d at 1107. Under this standard, there are three prerequisites to the application of collateral estoppel: "(1) . . . the issue at stake [must] be identical to the one involved in the prior litigation; (2) . . . the issue [must] have been actually litigated; and (3) . . . the determination of the issue in the prior litigation [must] have been a critical and necessary part of the judgment in that earlier decision." *Id.* (citations and internal quotations omitted).[5]

Moreover, in *Vazquez*, the Eleventh Circuit applied this standard to facts which are analogous to the circumstances in this case. In *Vazquez*, the jury convicted the defendant of culpable negligence based on his shooting six bullets through

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5. *Zeidwig* represented a departure from Florida's traditionally strict adherence to the requirement of mutuality of parties for the application of collateral estoppel. *See Stogniew v. McQueen*, 656 So. 2d 917, 919 (Fla. 1995). *Zeidwig* involved a criminal defendant who had brought an ineffective assistance of counsel claim in an unsuccessful post-conviction proceeding. The court estopped Zeidwig from raising the same claim in a legal malpractice action against his former lawyer. In *Stogniew*, the Florida Supreme Court made clear that the mutuality requirement still exists, distinguishing *Zeidwig* as a "narrow exception in which collateral estoppel was permitted in a defensive context and then only under the compelling facts of that case." *Id.*

his front door while his home was surrounded by police officers. In response to Vazquez's shooting, the offcers returned fire wounding Vazquez and killing his brother. According to the Court of Appeals, the only necessary conclusion from the jury's verdict was the jury's belief that Vazquez's actions were not reasonable in response to his situation. The verdict did not address or rule on the propriety of the police officers' actions after Vazquez's act of culpable negligence and from which Vazquez's excessive force claim arose. *Id.* The Eleventh Circuit went on to recognize that the "objectively reasonable" standard established in *Graham v. Connor*, 490 U.S. 386 (1989) for assessing an officer's actions in an excessive force case, does not foreclose the possibility that officers may respond in an illegal manner when responding to a criminal act. *See Vazquez*, 968 F.2d at 1107. *See also Nelson v. Jashurek*, 109 F.3d 142 (3d Cir. 1997) (plaintiff s conviction for resisting arrest did not preclude claim for excessive force under Cir. 1983); *Donovan v. Thames*, 105 F.3d 291 (6th Cir. 1997) (same); *Courtney v. Reeves*, 635 F.2d 326, 329 (5th Cir. 1981); *Hernandez v. City of Los Angeles*, 624 F.2d 935 (9th Cir. 1980) (section 1983 plaintiff s conviction for resisting arrest does not estop him from arguing excessive force in making arrest because the jury could have found that plaintiff and the officers used excessive force); *Williams v. Liberty*, 461 F.2d 325 (7th Cir. 1972) (plaintiff in § 1983 action not estopped from police brutality claim due to conviction for battery on police officer).

Having now had the opportunity to review the transcript of the criminal trial (to the extent available) in light of *Vasquez* and Florida law concerning collateral estoppel generally, the undersigned remains unable to conclude that

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Willingham's conviction necessarily resolved the question of whether the officers used unconstitutionally excessive force. Among other important distinctions, Willingham maintained in the criminal trial, just as she had in her civil trial, that she threw only one knife and was unarmed at the time of the shooting. Thus, although the jury found her guilty of attempted second degree murder of Panucci, the jury may have resolved the conflict in the evidence concerning whether one or two knives were thrown to be consistent with Willingham's version of the offense. If that occurred, the jury would never have reached the issue of whether Willingham was acting in self defense and whether the officers were justified in the use of deadly force after the first knife was thrown.[6] Thus, similar to *Vasquez*, it cannot be ascertained whether Willingham's criminal trial jury ever addressed the propriety of Loughnan and Beucler's actions.

In reaching this conclusion, the undersigned recognizes, as argued by Defendants, that the entire incident may have transpired in less than two minutes and that the events may have required the officers to make instantaneous judgments regarding their use of force. These facts are relevant, however,

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6. Another possible scenario is that the jury concluded that Willingham threw two knives, but *not* in defense of her brother. If so, the jury may not have reached the issue of whether the officers were justified in using deadly force. Also, the undersigned has considered but rejected Defendants' argument that the criminal trial jury necessarily convicted Willingham of second degree murder because she threw the *second* knife. As explained above, there were other possible resolutions of the conflicts in the evidence, particularly since Loughnan testified in the civil trial, presumably consistent with his testimony in the criminal trial, that he saw the first knife bounce off of Panucci's back or leg.

to the issue of whether the officers were entitled to the protections of qualified immunity — not to the technical legal defense of collateral estoppel. Given the conflicts in the evidence concerning the sequence of the pertinent events and the general nature of the verdict, Defendants cannot demonstrate that a determination that the officers were justified in shooting Willingham was a critical and necessary part of the jury's decision that Willingham attempted to kill Panucci.

Therefore, collateral estoppel, and the related doctrines of judicial estoppel and issue preclusion, did not preclude Willingham from proceeding to trial in this case.

B. *Heck v. Humphrey*

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the United States Supreme Court held that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487. Based on this ruling, Defendants contend that Plaintiff, who remains convicted of attempted second degree murder of Panucci, should have been precluded from bringing her § 1983 claim in this case.

However, *Heck* was decided on facts far more straightforward than those in the instant action. Heck was convicted in Indiana state court of voluntary manslaughter for killing his wife. While serving his sentence, Heck filed a § 1983 suit in federal court naming the prosecutors in the criminal

action and one of the investigators as defendants and claiming common law malicious prosecution. However, an essential element of a successful malicious prosecution action is termination of the prior criminal proceeding in favor of the accused. *See id.* at 484-85. Thus, the Supreme Court ruled that Heck's § 1983 action for malicious prosecution was necessarily precluded by his still valid conviction. *See id.* The Supreme Court's holding stemmed, in part, from the principle that a civil suit is not an appropriate vehicle to collaterally attack a conviction. *See id. See also* 8 S. Speiser, C. Krause, & A. Gans, American Law of Torts § 28:5, at 24 (1991).

As an example of a § 1983 action that would necessarily imply the plaintiffs wrongful conviction if successful, the Court considered a convicted state defendant sentenced for resisting arrest, who then brings a § 1983 action against the arresting officers. The Supreme Court explained that in order to prevail in the § 1983 action, the plaintiff "would have to negate an element of the offense of which he has been convicted." *Heck*, 512 U.S. at 487 n.6.

Further, the *Heck* Court noted that "if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed in the absence of some other bar to the suit." *Id.* at 487. As an example of such a situation, the Court noted that a suit for damages based on an allegedly unreasonable search may lie "even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction." *Id.* at 487 n.7. The Court explained that doctrines such as the independent source and

inevitable discovery doctrines,[7] as well as harmless error,[8] allow for the possibility of a successful suit for damages that would not necessarily imply the invalidity of the plaintiff's conviction. *See id. See also Gonzalez v. Entress*, 133 F.3d 551 (7th Cir. 1998) (application of excessive force to obtain confession violates Constitution and is actionable under § 1983 notwithstanding admission of confession at trial at which § 1983 plaintiff is convicted); *Simpson v. Rowan*, 73 F.3d 134 (7th Cir. 1995) (felony murder conviction did not bar § 1983 suit under Fourth Amendment based on illegal search because illegal search or arrest may be followed by valid conviction); *Rowe v. City of Ft. Lauderdale*, 8 F. Supp. 2d 1369, 1373 (S.D. Fla. 1998) (recognizing that suit for improper seizure of property would not imply invalidity of conviction for sexual battery under *Heck)*. Thus, whether *Heck* applies to preclude a § 1983 claim is dependent upon the identification of the precise factual and legal issues resolved by the criminal trial jury.

Since *Heck*, several courts have had occasion to consider under what circumstances *Heck* bars a plaintiff convicted of some form of assault on a law enforcement officer from maintaining a § 1983 action based on the alleged use of excessive force during the same incident. These decisions suggest that, consistent with *Heck*, the critical issue is whether the criminal case record conclusively demonstrates that the jury's finding of guilt actually reflected its judgment that the plaintiff's criminal conduct justified the use of force that is the subject of the plaintiff's subsequent § 1983 claim. Thus, for example, in *DuFour Dowell v. Cogger*, 969 F. Supp. 1107 (N.D. Ill.

7. *See Murray v. United States*, 487 U.S. 533, 539 (1988).

8. *See Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991).

1997), the district court held that the plaintiff's § 1983 action for excessive force was not barred due to her conviction for resisting arrest. Although the plaintiff had been charged with resisting arrest for pushing, kicking, and wrestling with the arresting officer, her conviction was pursuant to a jury instruction stating only that the jury had to find that "the defendant knowingly resisted or obstructed the performance by [the officer] of an authorized act within his official capacity." *Id.* at 1117. The court rejected many of the same arguments made by Defendants in the instant motion and held that, under *Heck*, a finding of excessive force would not necessarily be inconsistent with the validity of the plaintiff's conviction because it could not find with certainty that the criminal trial jury had concluded that the Plaintiff pushed, kicked, or assaulted the arresting officer, as opposed to some other conduct that amounted to resisting arrest.[9] *See id.* at 1118.

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9. The *DuFour-Dowell court* found that "[t]he jury was not required to specify on what basis it found DuFour-Dowell guilty of resisting arrest. The jury did not have to find that DuFour-Dowell physically resisted or retaliated when knocked to the ground. There were other actions on which the jury could have based its verdict." *DuFour Dowell*, 969 F. Supp. at 1117. Similarly, the jury in Willingham's criminal trial was not instructed that it had to find that any particular conduct constituted attempted second degree murder (*i.e.* with which knife they believed she attempted to stab Panucci). Also, the defendants in *DuFour-Dowell* argued that self-defense to excessive force is a defense to resisting arrest thereby making an excessive force finding inconsistent with DuFour-Dowell's conviction. *Id.* at 1118. The court rejected this argument because of the various facts from which the jury could have made a determination of resisting arrest. *Id.* The same is true for Willingham's conviction for attempted second degree murder.

Similarly, in *Smithart v. Towery*, 79 F.3d 951 (9th Cir. 1996) the plaintiff, who had been convicted of assault with a deadly weapon by driving a truck at the defendant police officers, alleged that he was beaten "beyond recognition with unnecessary force" after he exited his vehicle. *Id.* The Ninth Circuit held that, while the plaintiff was barred from challenging the validity of his arrest, his excessive force claim was not barred by *Heck* because it did not necessarily imply the invalidity of his conviction. *Id.* Moreover, the court recognized the possibility that by the time the alleged excessive force was applied, the plaintiff may no longer have posed a threat to the defendants. *Id. See also Wells v. Bonner*, 45 F.3d 90, 95 (5th Cir. 1995) (assuming without deciding that finding of excessive force during plaintiff's arrest would not imply the invalidity of plaintiff's conviction); *Simpson v. City of Pickens, Miss.*, 887 F. Supp. 126 (S.D. Miss. 1995) (plaintiffis valid conviction for resisting arrest under Mississippi law did not necessarily bar § 1983 claim for use of excessive force).[10]

Moreover, the Court has considered *Crooms v. P.O. Mercado*, 955 F. Supp. 985 (N.D. Ill. 1997), upon which Defendants heavily rely. In *Crooms*, the plaintiff, who had been convicted of resisting arrest, sued the arresting officer under § 1983 for having used excessive force in effecting the arrest. However, the sole factual dispute at Crooms' criminal

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10. *But see, e.g., Delaney v. Metelski*, 114 F.3d 1193 (9th Cir. 1997) (conviction of reckless endangerment precluded § 1983 action for use of excessive force by shooting during arrest); *Hudson v. Hughes*, 98 F.3d 868 (5th Cir. 1996) (recognizing *Wells* and *Smithart, supra*, but denying § 1983 excessive force claim under *Heck* on its facts due to conviction of battery on an officer). In *Hudson*, the court found that because the criminal jury rejected the justification defense, a successful § 1983 claim would imply invalidity of the conviction.

trial was whether the plaintiff pushed the defendant police officer prior to his arrest. Thus, the district court found from the criminal trial record that Crooms' conviction for resisting arrest necessarily required the jury to find that he pushed the officer: "The sole factual basis for the conviction was that Crooms resisted Mercado's investigation by pushing Mercado in the chest." *Id.* at 990. These facts, however, are clearly distinguishable from the instant action. Further, the *Crooms* court noted that "it is not always the case that a section 1983 claim for excessive force would necessarily imply the invalidity of a conviction for resisting an officer. . . . However, . . . because of the facts of this case, a successful prosecution of Crooms' section 1983 claim would necessarily imply the invalidity of his conviction for resisting an officer." *Id.* at 991. *See also Booker v. Ward*, 94 F.3d 1052, 1056 (7th Cir. 1996) (explaining that *Heck* does not bar a number of § 1983 Fourth Amendment claims because such claims do not "inevitably undermine the conviction") (citation omitted), *cert. denied*, 117 S. Ct. 952 (1997); *Simpson v. Rowan*, 73 F.3d 134, 136 (7th Cir. 1995) (holding that *Heck* did not bar § 1983 claim for illegal search because the claim would not necessarily undermine the plaintiff's conviction for felony murder), *cert. denied*, 117 S. Ct. 104 (1996).

Pursuant to *Heck* and the other decisions discussed above, the undersigned has attempted to identify the precise issues which were concluded as a result of the criminal jury's finding that Willingham attempted to murder Panucci in the second degree. Having done so, the undersigned remains persuaded that the jury's finding in this case, that Officers Loughnan and Beucler used excessive force when they shot Betty Willingham eight times, does not necessarily imply

the invalidity of her conviction. While it is true that much of the same evidence presented in the criminal trial was presented here, neither the jury's verdict, nor the instructions or charging document in the criminal case required that the jury find that Willingham threw the second knife upon which the Defendants relied in both cases to justify their use of deadly force. As discussed above with respect to the issue of collateral estoppel, the criminal jury may have resolved the evidentiary conflict consistent with Willingham's contention that she threw only one knife. Under that version of the facts, she would have been unarmed when she was shot, and consequently, the use of deadly force may not have been justified. Thus, because it is impossible to ascertain precisely upon what facts the jury convicted Willingham and because either scenario could plausibly support the conviction, a finding that the officers were not authored to use deadly force would not necessarily imply that she was wrongfully convicted. Therefore, her § 1983 claim would not be precluded by *Heck*.

III. *THE CITY'S MOTION FOR JUDGMENT AS A MATTER OF LAW*

The jury found "a pattern or custom within the City of Boynton Beach of failing to train, supervise or discipline the City's police officers that was deliberately indifferent to the risk of, and actually caused the deprivation of, Plaintiff's civil rights by Defendants Loughnan and Beucler." *See* Jury Verdict. In its Motion, the City contends that Plaintiff failed to present sufficient evidence to establish liability pursuant to this theory of municipal liability. Below, the Court summarizes the relevant evidence in the light most favorable to the Plaintiff and then explains the manner in which it was legally insufficient.

Appendix D

A. Evidence of a Custom or Policy

The evidence relevant to Plaintiff's claim against the City mainly consisted of the testimony of her expert, former City of Miami Chief of Police Kenneth Harms ("Harms"), the officers involved in Willingham's shooting, former BBPD Police Chiefs Hillery and Dettman, former BBPD Deputy Chief DeLoach and documentary evidence including BBPD's written policies concerning use of force, the findings of the Board, and two studies of the City's police force done after Willingham's shooting: the 1987 "Task Force Report" and the 1992 "Assessment of Police Department Status Regarding Race and Sex Discrimination" ("Murphy/Mayo Report"). By way of summary, this evidence, viewed in the light most favorable to Plaintiff, was as follows:

Kenneth Harms: Plaintiff's expert, Kenneth Harms, worked for the City of Miami Police Department from 1959 through 1985, serving as police chief from 1978 through 1984. Harms formulated his opinions by reviewing the depositions in this case, statements taken by the police department and the State Attorney's Office, the investigation and recommendation of the shooting Review Board in the Willingham matter, and the policies and procedures of the BBPD. From the beginning, Harms stressed the importance of training with respect to investigations into incidents involving the use of deadly force and citizens' complaints alleging the use of excessive force.

Harms' first "opinion" was based on his review of the internal affairs investigation done by Lt. Galbraith and Deputy Chief DeLoach. Based on his review of these documents,

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Harms was asked to assume that the officers shot Willingham upon observing her lunge with a knife from five or six feet away at another officer. He testified that if the officers believed that the life of another was in imminent peril as a result of such circumstances, then the use of deadly force would be appropriate. Assuming that the individual did not have anything in her hand but was standing on her stoop reaching for her head, Harms testified that the use of deadly force would not fall within the accepted police standards or prevailing practices within the law enforcement community.[11]

Harms noted that it is important to understand the facts and circumstances associated with a particular investigation by following what occurred from the time the incident started beyond its conclusion, in order to ascertain what the department did to investigate, and whether there were any discipline problems or training needs. He continued that it is important to examine a department's policy of investigating citizen complaints to make sure that there is a policy, and that such policy includes investigating all complaints based on established criteria, logging the complaints in some system to keep track of when they are generated, determining who is involved, documenting how long the investigation takes, and documenting the conclusion and resultant discipline or retraining. Harms testified that it is important to hold officers accountable for their conduct in order to establish zones of tolerance reflecting the boundaries of conduct that management will tolerate. In order to create appropriate zones of tolerance, it is important that there be both the effective

11. It is this inappropriate use of excessive force, according to Harms, that would result from the City's failure to train or supervise the officers with respect to the use of force.

reporting and investigation of citizens' complaints, and the proper supervision, training and discipline of officers.

Harms' second "opinion" was that the citizen complaint reporting system was inadequate based on two studies of the BBPD that were conducted after the Willingham shooting. When asked whether this finding had anything to do with whether excessive force was used on October 7,1987,[12] he opined that it did because if officers are not held accountable for their conduct, the zones of tolerance widen and create an atmosphere where officers may believe they will not be held accountable for their conduct. With respect to the recommendation that an early-warning system be instituted, Harms stated that such a system enables the department to track particular incidents, such as those involving the use of unnecessary force, so that supervisors can identify problem officers and determine what training, discipline, or other remedial action may be required.

Harms next discussed his review of the BBPD's written policies and its investigation of the Willingham incident. Harms found that, with the exception of certain areas, the BBPD's written policies generally comport with standards and prevailing practices in the law enforcement community. With respect to its policy on citizen complaints, Harms opined that the written policy is generally "good" but that the *de facto* application of the policy may not be. Similarly, Harms testified that the written policies of the Board are "good," but the Willingham investigation did not adequately follow the Board's policies. For example, there were no written reports

12. As the Court explains, *infra*, these studies were done *after* Willingham's shooting. Consequently, the information and recommendations were unavailable to the BBPD until after this incident.

by the two officers involved in the shooting, the investigation failed to identify all of the witnesses, the investigating officers failed to get sworn statements from the eyewitnesses, and the investigating officers failed to properly identify and document all of the physical evidence. Harms was particularly critical of the fact that the statements were not sworn and the transcripts of the statements were not signed. He also found that the investigation was incomplete and failed to address the incident in its entirety. Harms pointed out that Loughnan allowed Willingham to retreat into her house and grab a knife, and that the incomplete investigation resulted in insufficient information to properly evaluate what happened. Harms also expressed concern about a policy where incidents are reported up a chain of command to the chief who ultimately decides whether an investigation should be conducted. Rather, he opined that a department should have a system where certain criteria automatically trigger an investigation.

Next, Harms testified concerning the Board's Memorandum from Captain Clifford Lewis to Chief Hillery. He found the memorandum to be deficient under the BBPD's written policy and the prevailing standards and practices within the law enforcement community. Specifically, he criticized the fact that no record was created of who testified before the Board or what evidence was considered.[13] Harms also reviewed the BBPD's policy pertaining to use of deadly force and use of unreasonable force. He found that the deadly force policy was "good," but the unnecessary force policy was deficient in that

13. Contrary to this opinion, Captain Lewis's memorandum states that the Board interviewed Deputy Chief John DeLoach, Lt. William Galbraith, Sergeant Christopher Yanuzzi, Officer Warren Blum and Sergeant Henry Ostazewski.

it neither defined what "force" meant or what level of force was acceptable. Further, Harms' opined that a department that does not document, catalogue or log use of force incidents would not have a policy comporting with the standards and prevailing practices within the law enforcement community. He testified that for discipline or training purposes, all uses of force should be documented and logged, and should indicate which officers used force and under what circumstances.

Finally, Harms testified that, based on his review of the documentation of the Willingham investigation, the procedures, depositions and his experience, the City of Boynton Beach fell far short in its supervision, training and discipline of officers, specifically in regard to Officers Loughnan and Beucler.

The Task Force Report: In November 1987, the City of Boynton Beach created a nine member Task Force On Police Abuse and Racial Tension ("Task Force") to review allegations of police brutality against blacks that were prompted, in part, by the Willingham shooting. Comprised of a cross-section of the community, the Task Force generated a report based on the following findings: (1) that there was racial tension between the public and the police department in the Cherry Hills area (the area of the Willingham incident); and (2) that allegations of the use of excessive force[14] were often raised when large crowds gathered when officers attempted to make

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14. The Report stated: "While the Task Force heard individual testimonies from citizens . . . on allegations where police used excessive force in apprehending and making an arrest, based on limited data, the Task Force found no evidence of a systematic effort to abuse Blacks."

arrests in the minority community. The Report recommended, in relevant part, that the BBPD expand its system to allow citizens to file complaints at locations other than the police department, such as schools and churches. The Report also reflected only one instance in which an officer had been found to have used excessive force. As a result of that incident, Officer Blum had been suspended for holding a gun to the head of a Black suspect during questioning.

Murphy/Mayo Report: This Report was generated by an independent firm located in Alexandria, Virginia and was commissioned by the City Manager to assess the BBPD's status regarding race and sex discrimination. In part, the investigation was initiated because black citizens of Boynton Beach had expressed hesitancy in filing complaints that concerned police misconduct because they feared harassment and believed that their complaints would not be properly investigated. The study found that the complaint filing procedures for citizens were inadequate. The Report also indicated the need for an "early warning" file to alert the BBPD to an officer with a high number of complaints before a serious incident occurred. Ultimately, the Report's primary recommendation was the implementation of an improved civilian complaint review process and recording system.

Officer Loughnan: Officer Loughnan testified to some of the training that he received by the BBPD. This included weapons training and training with respect to the use of force in arresting suspects. He was trained to use force pursuant to a scale on which force levels escalate from mere presence through several intermediate levels to the use of deadly force to protect another from serious bodily injury or death. The lowest

levels of force after mere presence are verbal commands and then "soft hands" (*i.e.* simply grabbing an individual by the arm and escorting him out of a crowd for arrest). "Soft hands" was the type of force he attempted to use on Willingham when he tried to arrest her in her doorway. The next level of permissible force is "hard hands," which is the equivalent of fistfighting, followed by use of a police baton or nightstick, followed by deadly force. He also testified that he was a member of the SWAT team, for which he received special training for high-violence, armed conflict and hostage situations, and that, when he shot Willingham, he fired two "double-taps." He further testified that when using deadly force, he had been trained to shoot to kill and to "double-tap" — to pull the trigger twice very quickly, which is considered the equivalent of one shot.

Two days after Willingham's shooting, Loughnan gave his taped statement to Deputy Chief DeLoach. Loughnan never filled out a police report in this case. When he returned to the police station, he had a conversation with Officer Beucler about what had happened and what would happen to them at that point *(e.g.*, suspension, review boards, grand jury). Sometime after the incident, Loughnan testified before a grand jury that had been convened to determine whether his actions had violated any criminal statutes. The Grand Jury found no criminal action on his part.

Officer Beucler: Officer Beucler testified to some of the training that he received by the BBPD. His training included weapons training, and he explained that his shooting certification must be repeated every six months at the shooting range. He also explained that he was trained to "double-tap" when firing his semi-automatic weapon. Beucler spoke to

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Officer Bayerl at the police station immediately after the Willingham incident, but he did not fill out a police report or generate any notes with regard to the shooting. Two days later, he gave his statement to Deputy Chief DeLoach and he subsequently testified before the grand jury.

Deputy Chief DeLoach: DeLoach had been the deputy chief of the police department about a year when Willingham was shot. As deputy chief, he was responsible for investigating citizen complaints. DeLoach explained that the department utilized a Supervisor's Incident Report form for incidents involving excessive or deadly force, but that there was no form that an officer was required to complete after using force. He further testified that the department did not have any system for tracking incidents involving the use of force by the officer involved nor did it have any early warning system that would alert the department to a problem officer. He also testified that the witnesses to the Willingham incident were not required to review and sign their statements.

Chief Hillery: Chief Hillery became Chief of Police for the City in 1984 and was the Chief at the time of the Willingham shooting. At that time, the department was seeking accreditation. The Department did not have a separate internal affairs section; rather, Chief Hillery decided whether an internal affairs investigation would be done and by whom. Also, the department did not maintain a log of citizen complaints or an internal affairs log, nor did it have a formal early warning system to alert him to problem officers. However, all citizen complaints were maintained in one location and Deputy Chief DeLoach, who had had some training in internal affairs investigations, trained Lt. Galbraith to also conduct such

investigations. During Chief Hillery's tenure, there were investigations into police misconduct, but he never sought criminal charges against any officer for using excessive force.

He further testified that there was not an internal affairs investigation into the Willingham shooting because the matter was presented to the Shooting Review Board and the Grand Jury. He did not recall reviewing the investigation conducted by DeLoach and Lt. Galbraith for the Shooting Review Board, but was sure that DeLoach would have kept him informed.

He also recalled that he served on the Task Force that was convened after the Willingham shooting and that the Task Force was formed to investigate the relationship between the police force and the minority community. The Task Force concluded that the perception that excessive force was being used routinely in the minority community was not accurate. However, in response to the perception, he decided that citizen complaints would be accepted over the phone and at locations other than the police department. After the Murphy/Mayo Report, he made additional changes to the report filing system.

Former Chief Detman: Detman preceded Hillery as Chief of Police and served in that capacity for three years. He testified that during his tenure, citizen complaints were initially addressed by the watch commander, and then if necessary, they were passed on to the division commander for investigation, and that internal affairs investigations could result from this process. He also testified that no complaint or internal affairs log was maintained by the Department.

Detman further testified that, while he was Chief, he served on the Board that investigated all incidents in which officers

discharged their firearms in the line of duty. Finally, he testified that officers were taught a scale of force that could be utilized in effecting arrests and that officers were allowed to use their firearms to protect themselves or the life of another from death or serious bodily injury.

Written policies: Among the documents submitted into evidence by Plaintiff was General Order #11 — '85, "Use of Deadly Force" (PX 62E) which set forth the guidelines concerning the use of deadly force applicable at the time of the Willingham shooting. Generally, the policy allowed the use of deadly force only when necessary to protect the officer or another from the loss of life or serious bodily injury, but restricted the use of such force when lesser force could be used to restrain or apprehend a perpetrator and when deadly force would create an unreasonable risk to innocent persons. Also pursuant to the policy, every officer using deadly force was to be relieved of duty and placed in a non-disciplinary status with no loss of pay or benefits pending counseling and an investigation into the incident. Moreover, each incident involving the use of deadly force was to be reported up the chain of command and referred to the State Attorney's office for review.

The Plaintiff also submitted into evidence the Board's policy dated January 24, 1977 (PX 62A), providing that the Chief of Police convene a Shooting Review Board comprised of his appointees to investigate each instance in which an officer discharged a firearm that resulted in injury to a person or damage to property. The purpose of the Board was to conduct an in-depth investigation into the incident that addressed whether the use of deadly force comported with Florida law, whether the use of deadly force presented any

danger to civilians or other police personnel in the area, and whether the use of deadly force violated applicable departmental policy.

Lastly, the Plaintiff submitted an excerpt from the Department's policy manual setting forth the Department's policies concerning the use of force (PX 62 D) and the Department's citizen complaint policy, (PX 62B). The use of force policy counseled restraint in the use of force, prohibited the use of unnecessary force in making arrests, and provided for the use of only that degree of force necessary to effect the arrest and bring the prisoner safely to the police building for booking. The manual further required that each officer using physical force report such incidents as soon as possible to his supervisor. The supervisor was then required to write a report to the Chief of Police "through channels." According to the citizen complaint policy, all complaints were to be permanently and chronologically maintained in a central file, the Chief of Police or his designated subordinate was to be made aware of every complaint "without delay," the Department was to retain complete record of complaint reception, investigation and adjudication, and the complainants were to be notified of the final disposition of complaints. As to an investigation, the policy emphasized that complaints be investigated in a manner to insure "swift, fair, and efficient correction of reported complaints." Those procedures included deploying investigators during hours consistent with the incident prompting the complaint, public convenience and departmental needs, obtaining the assistance of prosecuting agencies and completing the investigation within thirty days unless an extension of the deadline was granted by the Chief of Police with notice to the complainant.

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B. Legal Analysis

As stated above, the sole theory of municipal liability that Plaintiff requested be submitted to the jury was whether the City, as a matter of custom or policy, was deliberately indifferent to the Plaintiff's Fourth Amendment right to be free from the use of excessive force. Therefore, to the extent that Plaintiff elicited testimony from Harms that was critical of BBPD's policies respecting citizen complaints and the use of unnecessary force at trial, Plaintiff's point was *not* that the policies as written were unconstitutional or otherwise illegal. Rather, Plaintiff's point was that the vagueness or weaknesses in the written policies was one of several factors contributing to the BBPD's failure to train or supervise its officers in the use of deadly force. Moreover, Harms pronounced the deadly force policy to be "good." Thus, the Court analyzes the evidence in accordance with the Supreme Court and Eleventh Circuit precedent which delimits the circumstances under which a municipality can be liable under § 1983 for having adopted a *de facto* policy or custom of inadequately training or supervising its employees.

The Supreme Court has established two fundamental requirements for holding a city liable under § 1983 for inadequate training or supervision policies: culpability and causation. *See Board of County Comm'rs v. Brown*, 520 U.S. 397 (1997); *City of Canton v. Harris*, 489 U.S. 378 (1989). First, the municipal policy must have been adopted with "deliberate indifference" to its known or obvious consequences. Second, the municipality must be the "moving force" behind the violation. *See City of Canton*, 489 U.S. at 388-89.

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In *Monell v. Department of Soc. Svcs. of City of New York*, 436 U.S. 658 (1978), the Court held that a local government may not be held liable under respondeat superior for constitutional torts committed by a municipal employee. Instead, it is only ". . . when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694. *Monell* also set a high threshold for causation, requiring that the plaintiff establish that the municipal policy be the "moving force" behind the constitutional violation. *Id.*

The Supreme Court clarified the *Monell* requirements in *City of Canton v. Harris*, 489 U.S. 378 (1989), a case in which the theory of liability was failure to train. The Court held that, in limited circumstances, a municipality can be held liable for a failure to train its police officers. Specifically, plaintiffs seeking to win under this theory must first prove a direct causal link between the municipal policy and the constitutional deprivation; they then must establish that the city consciously adopted a policy reflecting "deliberate indifference" to the relevant constitutional rights of its citizens. *See id.* at 389. The Court deemed these rigorous standards necessary in order to protect municipalities from *respondeat superior* liability under § 1983 and the courts from having to engage "in an endless exercise of second-guessing municipal employee-training programs." *Id.* at 392.

Subsequently, in *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997), the Supreme Court underscored the need for *Monell* plaintiffs to establish both the causal link ("moving force") and the city's degree of

culpability ("deliberate indifference") to federally protected rights. According to the Court, these requirements must not be diluted, for "[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability." *Id.*

Accordingly, the Eleventh Circuit Court of Appeals has demanded that plaintiffs seeking to impose § 1983 liability on local governments pursuant to the theory of deliberate indifference must satisfy a stringent standard of proof. For example, in *Gold v. City of Miami*, 151 F.3d 1346 (11th Cir. 1998), the Eleventh Circuit held that the police department was not deliberately indifferent to the plaintiff's constitutional rights when he was wrongfully arrested pursuant to Florida's disorderly conduct statute and the arresting officers refused to loosen the plaintiff's handcuffs in response to the plaintiff's complaints. The court noted that it "repeatedly has held that without notice of a need to train or supervise in a particular area, a municipality is not liable as a matter of law for any failure to train and supervise." *Id.* As Gold was unable to present any evidence of prior constitutional violations or false arrests under the disorderly conduct statute, or of any prior incidents in which a city police officer caused an injury by excessive force in handcuffing, his claim failed. *See id.* at 1354.

Similarly, in *Brooks v. Scheib*, 813 F.2d 1191 (11th Cir. 1987) the Eleventh Circuit reversed and remanded for entry of judgment in favor of the City of Atlanta on Brooks' claim that he had been deprived of his constitutional right to be free from excessive force because the City had failed to adequately supervise Officer Scheib, the officer who had arrested Brooks. Even though there had been ten citizen complaints about Officer

Scheib, the court held that the city did not have any notice of past police misconduct because the plaintiff "never demonstrated that past complaints of police misconduct had any merit." *Id.* at 1193. The court went so far as to state: "Indeed, the number of complaints bears no relation to their validity." *Id. See also Popham v. City of Talladega*, 908 F.2d 1561 (11th Cir. 1990) (finding no liability to train when no pattern of incidents puts the city on notice of a need to train).

1. Deliberate Indifference

Pursuant to the authorities discussed above, the Court has examined whether the Plaintiff in this case presented evidence from which a reasonable fact finder could conclude that the City was deliberately indifferent to the rights of its citizens to be free from the use of excessive force by failing to adequately train or supervise its police officers. Again, as stated by the Supreme Court in *City of Canton:* "Only where a failure to train reflects 'deliberate' or 'conscious' choice by a municipality — a 'policy' as defined by our prior cases — can a city be liable for such a failure under § 1983." *City of Canton*, 489 U.S. at 388-89. *See also Gold*, 151 F.3d at 1346. Moreover, it is well settled in this Circuit that, as a matter of law, a municipality is not liable for any failure to train or supervise without notice of a need to train or supervise in a particular area. *See City of Canton*, 489 U.S. at 378.[15] Thus, in

15. *See also Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994) (plaintiffs not likely to succeed on merits of failure-to-train claim without proof that City was aware of prior incident in which constitutional rights were similarly violated); *Wright v. Sheppard*, 919 F.2d 665 (11th Cir. 1990) (sheriff's department not liable for

(Cont'd)

order to establish deliberate indifference, Plaintiff must have presented evidence that the BBPD knew that it needed to better supervise its officers with respect to deadly force, and that it made a deliberate choice not to take any action. *See Gold*, 151 F.3d at 1350-51 (citing *Brown*, 117 S. Ct. at 1390-91).

Plaintiff presented no evidence of incidents other than her own where deadly force was used improperly or where unnecessary force was used by BBPD officers that would have put the City on notice that its supervision of officers was inadequate.[16] Instead, Plaintiff argues that BBPD's training and supervision program was inadequate because, contrary to national policing standards,[17] BBPD failed to

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deputy's acts when "no evidence of a history of widespread prior abuse . . . put the sheriff on notice of the need for improved training or supervision."); *Popham*, 908 F.2d at 1564-65; *Brooks*, 813 F.2d at 1191.

16. The Task Force Report references an incident wherein Officer Blum was suspended for holding a gun to the head of a suspect during questioning. This reference is the sole evidence in the record concerning other incidents where there was actually a finding of the use of excessive or unnecessary force, but it is unclear from the report when the incident occurred. The Plaintiff also presented no evidence of citizen complaints that any officers in the BBPD used excessive or unnecessary force or that excessive or unnecessary force was customarily employed by the BBPD.

17. The failure to conform to national policing standards is relevant to whether the City was negligent, but is not probative of deliberate indifference. *See Reed v. Hoy*, 909 F.2d 324, 331 (9th Cir. 1989), *cert. denied*, 501 U.S. 1250 (1991).

maintain logs such as citizen complaint logs, internal affairs logs, failed to have an "early warning system" that required certain types of internal reporting, and failed to conduct its internal investigations in a more thorough manner. According to Harms, these deficiencies could have created a zone of tolerance in which the use of excessive force was condoned by the City. That argument fails, however, because there was no objective evidence presented that the BBPD intended or deliberately chose to create a zone of tolerance, that a zone of tolerance actually existed in the BBPD, or that the identified deficiencies actually resulted in the use of excessive force. In other words, there was no evidence presented to the jury that the City knew of the alleged shortcomings or the potential results of such deficiencies and deliberately chose to ignore them. Similarly, no evidence was presented that there actually was a problem with the use of excessive, unnecessary or deadly force in the BBPD which the City ignored.[18] Thus, there was no evidence presented from which a rational jury could have concluded that the City was deliberately indifferent to the Plaintiff's constitutional rights.

In reaching this conclusion, the undersigned has considered that, hypothetically, "in a narrow range of circumstances," a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. *See Brown*, 117 S. Ct. at 1391 (holding that isolated incident of sheriff's inadequate screening of deputy did not create such an obvious risk that it alone established the municipality's deliberate

18. Even the task force found that the minority community's perception that unnecessary force was being used by the BBPD in the Cherry Hills area was unfounded.

indifference to the risk that the deputy would use excessive force).[19] For example, a plaintiff in a different case might be able to argue successfully that a complete failure to train or supervise police officers in the use of firearms would pose so obvious a risk that it would constitute deliberate indifference on the part of government to the constitutional rights of its citizens to be free from the use of excessive force without the need for the presentation of additional evidence. That hypothetical, however, is distinguishable from the facts here. In this case, the evidence was undisputed that BBPD officers were trained in the use of firearms and in the use of force generally, that they were supervised, albeit not to Harms' satisfaction, and that the City had no objective basis for questioning the efficacy of its training and supervision programs. As quoted by the Eleventh Circuit in Gold, "Unlike the risk from a particular glaring omission in a training regimen, the risk from these possible [record-keeping] imperfections, if any, in the City police officers' training and supervision here is not obvious in the abstract." Gold, 151 F.3d at 1352 (quoting Brown, 117 S. Ct. at 1391) (internal quotations omitted).

2. Causation

Moreover, assuming *arguendo* that Plaintiff proved the existence of a policy or custom of failing to adequately train,

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19. In *City of Canton*, the Supreme Court in dictum left open the question of whether the need to train could be so obvious that evidence of prior incidents would not be required to establish a city *policy. See City of Canton*, 489 U.S. at 390 (giving as an example the obvious need to train police officers on the constitutional limitations on the use of deadly force). Subsequently, in *Brown*, the Court explained it was merely hypothesizing such a result in a "narrow range of circumstances." *Brown*, 117 S. Ct. at 1391.

supervise or discipline BBPD officers in the use of excessive or deadly force, Plaintiff was also required to establish that such policy or custom was the "moving force" behind Defendants Loughnan's and Beucler's use of excessive force against the Plaintiff. *See Monell*, 436 U.S. at 694-95. In *City of Canton*, the Supreme Court explained that a policy or custom is a "moving force" only where "a direct causal link" between the relevant policy and the constitutional deprivation can be demonstrated. *See City of Canton*, 489 U.S. at 385. Thus, the Court stated the relevant inquiry to be: "Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?" *Id.*

Plaintiff, in her opposition memorandum, argues that Harms' testimony was sufficient to create a jury issue on causation. Specifically, she argues that the jury could have found the requisite causal connection based upon his testimony concerning the "widened zone of tolerance" within BBPD due to the lack of documentation concerning citizen complaints, internal affairs investigations, and early warning systems. *See* Plaintiff's Memorandum, p. 8. However, there are at least three fatal flaws with Plaintiffs position. First, Harms was unable to say that such a zone of tolerance actually existed in the City; rather, he could only say that the lax record keeping and other deficiencies that he noted "could" create a zone of tolerance in which misconduct was tolerated. Second, there was no evidence that such a zone of tolerance existed within the BBPD or that the conduct of Defendants Loughnan and Beucler in shooting Willingham had been influenced by it. Third, and most important, there was no evidence that the shooting would have been prevented if the City maintained all of the records and otherwise conducted its

business in accordance with Harms' standards. In the absence of such evidence, Plaintiff's claim against the City must fail.

In reaching this conclusion, the Court has considered *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 636 (1993), upon which Plaintiff relies. *Vineyard*, however, is not controlling because it is easily distinguishable from the facts of this case. In *Vineyard*, the county had no policy and procedures manual, did not require deputies to file arrest reports after beatings or confrontations occurred, did not log citizens' complaints, and did not investigate any complaints. Based on that evidence, the Court found the evidence sufficient to allow a jury to find the county's policies to be the "moving force" behind the deputies' "use of gratuitous force" in beating the plaintiff repeatedly. *Id.* at 1213. In contrast, although the evidence in this case shows the City's training and supervision programs might have been improved, the BBPD had written policies and procedures, and trained and supervised its officers with respect to the use of all types of force, including deadly force. *Compare Gold*, 151 F.3d at 1346.

Brooks v. Scheib, 813 F.2d 1191, 1195 (11th Cir. 1987) is factually more similar to this case. In *Brooks*, the Court held that the plaintiff failed to establish that any city policy deprived him of his civil rights because of his failure to adduce any evidence "from which a jury could infer that these allegedly deficient procedures were the 'moving force of the constitutional violations.' " *Id.* at 1195 (quoting *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)). The plaintiff in *Brooks* alleged that the city's handling of citizens' complaints of police misconduct led to the violation of his civil rights when

he was involved in an altercation with a police officer against whom other citizens' complaints had been filed. The Court found, however, that the plaintiff never demonstrated that the city officials were aware of past police misconduct or that a different procedure for processing citizens' complaints would have prevented plaintiff's injuries. There was insufficient evidence that the city's policies were deficient in not requiring that past complaints about officers be brought to the attention of investigators evaluating new complaints, in failing to require officers be given polygraphs about complaints, and in failing to require that citizens be given a role in reviewing complaints. *Id.* at 1193-95. The Court held that the plaintiff "fails to establish the causal element — the 'affirmative link' between the procedures for investigating citizens' complaints and Scheib's deprivation of Brooks' constitutional rights — necessary to prove a § 1983 claim." *Id.* at 1195 (citing *Rizzo v. Goode*, 423 U.S. 362, 371 (1976)). The Court continued that the plaintiff produced "no evidence that different procedures for processing citizens' complaints would have resulted in Officer Scheib being disciplined. Brooks was obligated to produce some evidence that the complaints against Scheib had some merit and that more effective citizens' complaint procedures would have prevented his injuries." *Id.*

Willingham puts forth a theory similar to the plaintiff's theory in *Brooks*. Her "zone of tolerance" theory presupposes that the City's poor supervision, assuming it was proven, resulted in the violation of her civil rights because the officers knew there would be no consequences for their actions. The evidence falls short of proving causation, however, absent evidence that different procedures would have prevented her

injuries. *See id.* As the Plaintiff was unable to produce such evidence, the Plaintiff failed to prove an essential element of her claim against the City under 42 U.S.C. § 1983.

V. *CONCLUSION*

Based on the foregoing, it is hereby ORDERED AND ADJUDGED as follows:

1) Defendants' Motion for New Trial is DENIED.

2) Defendants' Motion for Remittitur is DENIED.

3) Defendant Loughnan's and Beucler's Motion for Judgment as a Matter of Law is DENIED. The stay of execution as to the Judgment against these Defendants is lifted.

4) Defendant City of Boynton Beach's Motion for Judgment as a Matter of Law is GRANTED. The jury's verdict against Defendant City of Boynton Beach in the amount of $5,000,000 is set aside and DISMISSED. Judgment is entered in favor of the City of Boynton Beach.

DONE AND ORDERED in Chambers at Miami, Florida, this 30 day of November, 1998.

s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION(S) FOR REHEARING DATED AND FILED FEBRUARY 15, 2002

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-4005-FF

BETTY WILLINGHAM,

Plaintiff-Appellee-Cross-Appellant,

versus

JAMES LOUGHNAN, BRIAN BEUCLER,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, ____F.2d____).

Before: EDMONDSON, BLACK and McKAY*, Circuit Judges.

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* Honorable Monroe G. McKay, United States Circuit Judge for the Tenth Circuit, sitting by designation.

Appendix E

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ K. Edmondson
UNITED STATES CIRCUIT JUDGE

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 2, 1997

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-4714

D. C. Docket No. 90-8156-CIV-UNGARO-BENAGES

BETTY WILLINGHAM,

Plaintiff-Appellee,

versus

JAMES LOUGHNAN, BRIAN BEUCLER,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(September 2, 1997)

Before ANDERSON, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

Appellants Loughnan and Beucler, who are police officers, appeal the district court's denial of their motion for summary judgment on the basis of qualified immunity. Although appellants seek to rely upon plaintiff's prior

conviction of attempted second degree murder, we decline to address any issue of collateral estoppel or issue preclusion because appellants did not present the criminal trial transcript to the district court in support of their motion for summary judgment, nor did they include said transcript in the record on appeal. In the absence of any issue preclusion, and in the summary judgment posture of this case, we must accept as true plaintiff's version of the relevant facts. According to plaintiff, she was shot when she was merely standing in the doorway of her house, screaming and pulling her hair and posing no threat to anyone. If the officers fired on plaintiff even though she was posing no threat to anyone, they would have violated clearly-established law.[1]

AFFIRMED.

---

1. Because appellants failed to present to the district court an argument based on *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994), we decline to entertain any such argument raised for the first time on appeal.

APPENDIX G — OMNIBUS ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MAY 3, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-8156-CIV-UNGARO-BENAGES

BETTY WILLINGHAM,

Plaintiff,

vs.

JAMES LOUGHNAN, et al.,

Defendants.

OMNIBUS ORDER

THIS CAUSE came before the Court upon Defendants' Motion for Summary Judgment filed November 6, 1995 (D.E. 178) and Plaintiff's Motion to Strike Defendants' Motion for Summary Judgment filed November 24, 1995 (D.E. 187).

THE COURT has considered that Motions, responses and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED the following:

(1) that the Motion for Summary Judgment is hereby DENIED. It appears from a careful review of the motion, filings and attachments that there remain in dispute genuine issues of material fact regarding the circumstances involved in the incident at question — and thus the applicability of qualified immunity to this case. Hence the moving parties are not entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Furthermore, as Plaintiff points out, summary judgment was previously denied on the issue of qualified immunity on March 9, 1993, for this same reason, and the Court remains convinced that further evidence proffered in the case has not served to resolve the factual disputes; and

(2) that the Motion to Strike is hereby DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 3 day of May, 1996.

s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
JUN 17 2003
OFFICE OF THE CLERK

No. 02-1694

In The

Supreme Court of the United States

BETTY WILLINGHAM,

Petitioner,

v.

JAMES LOUGHNAN AND BRIAN BUECLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether reliance by the Court of Appeals upon precedential authority of this Court, its own decisions and that of the state supreme court to determine clearly established constitutional rights or law conflicts with a persuasive, contrary consensus of the other Courts of Appeals to defeat the officers' entitlement to qualified immunity?

2. Whether an interlocutory appeal affirming a denial of a state official's claim to qualified immunity because of a dispute of material facts constitutes the "law-of-the-case" that precludes further consideration of their claim at trial or upon subsequent appeal post-trial?

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RESPONDENTS LOUGHNAN & BUECLER'S BRIEF IN OPPOSITION TO PETITIONER WILLINGHAM'S SECOND PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On October 7, 1987, just before midnight, Petitioner Betty Willingham, was simultaneously shot by Boynton Beach, Palm Beach County, Florida police Officers James Loughnan and Brian Buecler after having committed a battery on Officer Loughnan and within a split-second of having attempted to murder Officer Ron Panucci, who was attempting to arrest her brother, Arnold Sims.

According to the officers, who testified at her criminal and civil trial, she had a long blade kitchen knife in her hand and was attempting to stab Panucci in the back at the time she was shot. An independent witness testified at both trials that she was on the step outside her house with an object in her hand at the time she was shot. Willingham claimed that she was standing in the doorway, pulling her hair at the time she was shot. Her version of the events was rejected when she was convicted in June 1989 of both crimes by the Palm Beach County criminal court jury, a conviction that was neither appealed nor vacated.

In 1990, Willingham sued the City of Boynton Beach, its police chief Edward Hillery and Officers James Loughnan and Brian Buecler. After the officers moved for summary judgment on the sole state law claims against them in 1992, Plaintiff amended her complaint to bring federal

civil rights claims against them. The officer's summary judgment on the state law claims was denied in 1993.[1]

The officers moved for summary judgment on the federal claim of excessive force in 1995, asserting qualified immunity. In 1996, the District Court denied the motion finding that there was a factual dispute not specified in the order and upon the misapprehension that there had been a previous denial of the motion. The officers took an interlocutory appeal to the Eleventh Circuit. Petitioner's motion to dismiss the appeal as frivolous was denied and a stay order denied by the District Court was granted by the Court of Appeals.

In September 1997, the Court of Appeals, in an unpublished opinion, affirmed the denial of the motion for summary judgment due to the claimed factual dispute of whether Plaintiff was doing nothing at the time she was shot or was attempting to murder an officer. In the panel's view, the issue preclusion argument on Petitioner's criminal convictions was not properly presented for review.

After the District Court again denied the officers motions for judgment on qualified immunity at trial and post-trial, a timely appeal was lodged in the Court of Appeals of the 5.5 million dollar verdict rendered against the officers by a jury in Miami-Dade County.[2] Upon review of the entire record, including the criminal trial transcript and proceedings (as had the District Court when it decided

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[1] These claims were eventually dropped by Plaintiff at the commencement of trial.

[2] The judgment against the City of Boynton Beach for five million dollars was set aside by the District Court and affirmed on appeal. Petitioner did not seek review of that decision in her first petition for writ of certiorari.

the officers' post-trial motion for judgment) the Court of Appeals properly found that the criminal conviction at a minimum established that Plaintiff was shot within a "split-second" of having attempted to murder one police officer and battering another and was not restrained and potentially in a position to continue her assaults on the police.

Finding that it was not clearly established in 1987 that the use of force by these officers under the circumstances presented to them was unlawful, and that there existed a number of decisions both before and subsequent to the incident, under materially similar circumstances, holding that such conduct was lawful, the court determined that qualified immunity was applicable to bar the Petitioner's Fourth Amendment claim against the officers.

Petitioner's suggestion for rehearing *en banc* was denied as a motion for rehearing by the panel. No request was made by a judge of the court to poll the judges on the suggestion of rehearing *en banc*.

A petition for writ of certiorari was timely filed with this court to hold the case pending this Court's decision in *Hope v. Pelzer*.[3] A brief in opposition was filed. Without further briefing, after a decision was rendered in *Hope*, this Court entered an order granting certiorari, vacating the decision of the Court of Appeals and remanding for reconsideration in light of *Hope*.

The Court of Appeals requested supplemental briefs from the parties on the issue of reconsideration of the decision in light of *Hope*. The parties timely filed briefs. The Court of Appeals rendered its reconsidered opinion

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[3] 536 U.S. 730, 122 S.Ct. 2508 (2002).

finding that the officers were still entitled to qualified immunity. [Pet. App. A].

Without moving for a rehearing *en banc* in the Court of Appeals, Petitioner timely filed her second petition for writ of certiorari with this Court.

REASONS FOR DENYING THE WRIT

PREFACE

The first question presented, whether the Court of Appeal's reliance upon only the Constitution, prior decisional law of this Court, the Court of Appeals and the state supreme court, a position allegedly contrary to the other Courts of Appeals, is raised for the first time in this petition.[4]

The second question presented, whether the law-of-the-case doctrine in deciding succeeding appeals on qualified immunity, has been rejected by the Court of Appeals, contrary to the view of the other Courts of Appeals, is also first raised in this petition. The contention that the Court of Appeals failed to follow its own precedent on the issue was first previously raised in the first petition for writ of certiorari. This latter issue was not specified as an issue for reconsideration upon remand.

[4] The first "question presented for review" initially [Pet. at *i*] differs from the questions described in the table of contents [Pet. at *iii*] and the headings in "reasons for granting the writ." [Pet. at 7]. The latter description of the questions presented will be addressed herein.

I. The questions presented were not properly preserved for review.

Neither question or issue was timely pressed or considered by the courts below. In the Court of Appeals, Petitioner's response brief to the initial appeal, made no argument, nor cited any case in support of the proposition that there was precedent prior to 1987 that gave fair and clear warning to a reasonable officer that his conduct under these circumstances presented to him would violate constitutional law.

Petitioner's focus, in her initial response, was that there was no qualified immunity in an excessive force claim. However, that contention was rejected by this Court in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001).

Upon remand from this Court for reconsideration, in her supplemental brief, Petitioner did not cite to any consensus of persuasive authority from the other Courts of Appeals that should have been considered to have given fair warning to the officers that their conduct in October 1987 violated clearly established law. [Resp. App. A].

Contrary to the invitation for supplemental briefing, Petitioner did raise the law-of-the-case argument in her supplemental brief. However, no argument was made that the position of the Court of Appeals was different from the other Courts of Appeals or that there was a consensus of persuasive authority that should have been followed.

Thus, certiorari should not be granted because the issues presented for review were neither timely presented nor considered in the Court of Appeals or the District Court. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259, 107 S.Ct. 1114, 1115, 94 L.Ed.2d 293 (1987) ("We

ordinarily will not decide questions not raised or litigated in the lower courts. *See California v. Taylor*, 353 U.S. 553, 556, n. 2, 77 S.Ct. 1037, 1039, n. 2, 1 L.Ed.2d 1034 (1957)").

II. The decision of the Court of Appeals after remand does not conflict with this Court's decisions, its own precedent, nor a consensus of persuasive authority of the Courts of Appeals on the issue.

A. No conflict with *Hope*.

Initially, it is instructive to note that in *Hope v. Pelzer*, 530 U.S. 730, 122 S.Ct. 2508 (2002), qualified immunity was denied because this Court found that there was preexisting precedent in the Court of Appeals that gave clear and fair warning that the officers' conduct, as shown by the facts alleged, violated the Eighth Amendment proscription against cruel and unusual punishment. This Court concluded that *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) was controlling precedential authority since there was not a significant difference between handcuffing prisoners to a fence and handcuffing them to a post. As this Court noted:

> Cases decided by the Court of Appeals for the Fifth Circuit before 1981 are binding precedent in the Eleventh Circuit today. See *Bonner v. Prichard*, 661 F.2d 1206 (C.A.11 1981). In one of those cases, decided in 1974, the Court of Appeals reviewed a District Court decision finding a number of constitutional violations in the administration of Mississippi's prisons. *Gates v. Collier*, 501 F.2d 1291.

Hope, 530 U.S. at 742, 122 S.Ct at 2516. This Court specifically noted that "[i]n light of *Gates*, the unlawfulness of the alleged conduct should have been apparent to the respondents." *Id.* at 743.

This Court then added that "[t]he reasoning, though not the holding, in a case decided by the Eleventh Circuit in 1987 sent the same message to reasonable officers in that Circuit." *Id.* In *Ort v. White*, 813 F.2d 318 (11th Cir. 1987), this Court felt that the basic premise of depriving prisoners of necessities, such as drinking water, as punishment was established as violative of the Eighth Amendment.

This Court even held that a number of contrary "unreported" Alabama District Court decisions should have been disregarded, because they were "distinguishable on their own terms . . . [and] no match for the Circuit precedents." *Hope* at 747.

This Court did not look to "a consensus of persuasive authority" of the Courts of Appeals to determine whether fair warning was provided to the officers *in the circuit*. The focus was clearly limited to binding precedent in the Eleventh Circuit. Petitioner must have reached this same understanding because she did not argue to the contrary in her supplemental brief upon reconsideration. [Resp. App. A.].

The holding of the Court of Appeals below is not contrary to the decisions of this Court. In *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001), this Court observed that the general rule that officers may not use unreasonable force when making an arrest can only provide concrete guidance when it is made specific in particular cases. Additionally it was re-emphasized that "[e]xcessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." *Id.*, 533 U.S. at 207.

In *Saucier*, citation was made to *Roy v. Inhabitants of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994). Therein, the District Court properly granted summary judgment for the

defendant police officer who shot an armed, intoxicated, belligerently behaving arrestee. *Roy* stated:

> The Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases. Decisions from this circuit and other circuits are consistent with that view. And in close cases, a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently. 42 F.3d, at 695 (footnote omitted).

Saucier, 533 U.S., at 216, fn. 6, Ginsburg, J. concurring.

Moreover, The Court of Appeals has not ignored *U.S. v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219 (1997). In *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1032-1033, (11th Cir. 2001) (*en banc*), the court addressed issues raised by *Lanier*. In note 9, the court noted:

> We acknowledge that preexisting case law, tied to the precise facts, is not in every situation essential to establish clearly the law applying to the circumstances facing a public official so that a reasonable official would be put on fair and clear notice that specific conduct would be unlawful in the faced, specific circumstances. *See United States v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219, 1227, 137 L.Ed.2d 432 (1997) ("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.") (discussing 18 U.S.C. § 242); *Lassiter*, 28 F.3d at 1150 n. 4 (leaving open possibility that "occasionally the words of a federal statute or federal constitutional provision will be specific enough to establish the law applicable to particular circumstances clearly

> and to overcome qualified immunity even in the absence of case law");
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> . . . .
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> Some general statements of law are capable of giving fair and clear warning in some circumstances: the occasional "obvious clarity" cases per *Lanier*. But in other cases, as *Lanier* says, "a very high degree of prior factual particularity may be necessary." 117 S.Ct. at 1227. Especially where the applicable legal standard is a highly general one, such as "to act reasonably" or "to act with probable cause," preexisting case law, that has applied the general law to specific circumstances, will almost always be necessary to draw the bright line that is capable of honestly giving fair and clear notice that an official's conduct will violate federal law. *See Anderson*, 107 S.Ct. at 3040 (noting that pertinent qualified immunity question in probable-cause case is "fact-specific" question of whether a reasonable official could have believed, in light of clearly established law, that official's behavior was lawful under circumstances).
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> . . . .
>
> *See also Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001) ("This inquiry [whether a legal right was already clearly established], it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition"); *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 1699-1700, 143 L.Ed.2d 818 (1999) (saying "the right allegedly violated must be defined at the appropriate level of specificity. . . . ").

Marsh, 268 F.3d at 1032-1033.

Clearly, the Court of Appeals has found that "[o]ccasionally the words of a federal statute or federal

constitutional provision will be specific enough to establish law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of case law." *Lassiter v. Alabama A&M University*, 28 F.3d 1146, 1150 n. 4 (11th Cir. 1994). As recognized in *Marsh*, the Court of Appeals has held that an official may stray Aso far beyond the hazy border between constitutional and unconstitutional conduct" that the official "had to know he was violating the Constitution even without case law on point." *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000) (quoting *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997)). *Id.*, 268 F.3d at 1032.

This view of the Court of Appeals was noted in *Saucier v. Katz*, *supra*, "Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force,' *Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (C.A.11 2000), and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier*, 533 U.S. at 206.

Moreover, in *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692 (1999), decided two years after *Lanier*, this Court found the principles of *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987), still controlling:

> In *Anderson*, we explained that what "clearly established" means in this context depends largely "upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S. at 639, 107 S.Ct. 3034. "[C]learly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to

> say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.*, at 640, 107 S.Ct. 3034 (citations omitted); see also *United States v. Lanier*, 520 U.S. 259, 270, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

Wilson, 526 U.S. at 614-615.

B. No conflict with circuit precedent.

In the Court of Appeals, on remand, Petitioner asserted that "fair warning" of violation of a clearly established constitutional right was provided by *Tennessee v. Garner*, 471 U.S. 1 (1985); *McKinney v. DeKalb County*, 997 F.2d 1440 (11th Cir. 1993); *Vazquez v. Metropolitan Dade County*, 968 F.2d 1101 (11th Cir. 1992); *Samples v. City of Atlanta*, 846 F.2d 1328 (11th Cir. 1988); *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985); and *Clark v. Beville*, 730 F.2d 739 (11th Cir. 1984). Clearly, *McKinney* decided in 1993, *Vazquez* decided in 1992 and *Samples* decided in 1988, could not have given fair warning of clearly established law in 1987.

However, no analysis was provided below, nor in the petition herein, as to how these decisions would have given fair warning of clearly established law as applicable to the circumstances presented in this case. Thus, Petitioner has not provided any argument or analysis from which one could conclude that the determination by the Court of Appeals that "[n]one of these cases were close to this one in time or fact" is incorrect. *Willingham v. Loughnan*, 321 F.3d 1299, 1304 (11th Cir. 2003).

Petitioner's underlying focus is that this Court should revisit the underlying facts and reach the opposite result. Essentially, Petitioner wants this Court to "correct the result" rather than decide a conflict of the Courts of Appeals. Petitioner argues that "the second panel of the Court of Appeals ignored much of the evidence considered by the civil jury which did not conflict with the findings of the criminal jury." [Pet. at 9]. Petitioner ignores any discussion of the undisputed and judicially noticed fact that she was convicted of battery on one police officer and attempted murder of another for her conduct occurring within a "split second" of the use of force against her.

Petitioner's argument that the Court of Appeals was ignorant of "Respondents' own conduct of lies, planted evidence and a cover-up." [Pet. at 11] is simply not relevant to the qualified immunity analysis, as these are arguments, allegedly supporting claims that were never alleged against the officers, and which could have only been alleged against the City and even then, would have been barred by the Petitioner's conviction under *Heck v. Humphrey*, 512 U.S. 477, 483-485, 114 S.Ct. 2364, 2372-2373, 129 L.Ed.2d 383 (1994). *See Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996) (falsified police report, state witnesses committing perjury, ineffective counsel); *Killian v. City of Riverview*, 98 F.3d 1342 (6th Cir. 1996); *Hamilton v. Lyons*, 74 F.3d 99, 103 (5th Cir. 1996) (altering, destroying and suppressing evidence); *Franklin v. County of Riverside*, 971 F.Supp. 1332 (C.D. Cal. 1997) (perjury of police officer and false police report)

This argument's lack of relevance is corroborated by citation to *Webster v. City of Houston*, 689 F.2d 1220 (5th Cir. 1982). Not only was this initial panel decision vacated *en banc*, the decision related solely to the trial court judgment

finding municipal liability against the City of Houston. See Webster v. City of Houston,735 F.2d 838 (5th Cir. 1984). The City of Boynton Beach is no longer a party to these proceedings since the trial court's judgment notwithstanding the verdict was affirmed by the Court of Appeals and the City was not made a party to the first petition for certiorari.

C. No conflict with any consensus of persuasive authority from other circuits.

Petitioner claims, in her second quest for certiorari jurisdiction of this Court, that there is a conflict of the Court of Appeals with the views of all of the other Courts of Appeals with respect to the source of decisional law utilized in determining whether a constitutional right is "clearly established." Although the lengthy survey of the other circuits' approach is instructional, it does not reveal that there is any consensus.

More importantly, the decisions reviewed do not establish that there was a consensus of persuasive authority, in 1987, that would have given fair warning to reasonable officers that their conduct, under the facts presented to them by this case, in seconds before they reacted, would violate clearly established law.

In *Thomas v. Roberts,* 323 F.3d 950 (11th Cir. 2003), the Court of Appeals noted:

> In *Marsh v. Butler County*, 268 F.3d 1014 (11th Cir. 2001) (en banc), we implicitly reaffirmed that position when we stated that we do not understand *Wilson* to have held that a consensus of cases of persuasive authority would be able to establish law clearly. "Each jurisdiction has its own body of law, and splits between jurisdictions on matters of law are not uncommon. We do not

> expect public officials to sort out the law of every jurisdiction in the country." *Id.* at 1032 n. 10.

Thomas, 323 F.3d at 955. Petitioner's contrary contention would require police officer's to predict the course of a future decision of constitutional law. *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1001 (1975) ("That is not to say that school board members are 'charged with predicting the future course of constitutional law.' *Pierson v. Ray*, 386 U.S. at 557, 87 S.Ct. at 1219").

Contrary to Petitioner's argument, in *Clem v. Corbeau*, 284 F.3d 543 (4th Cir. 2002) (a decision announced 15 years post incident) there is no discussion of decisional law of other circuits as clearly establishing the law in the Fourth Circuit.[5] The Fourth Circuit did note that, "[w]ell before 1998 it was clearly established that a police officer could not lawfully shoot a citizen perceived to be unarmed and non-dangerous, neither suspected of any crime nor fleeing a crime scene." 284 F.3d at 554. However, that principle of *Garner*, has never been disputed. This decision is simply not apposite to the facts in this case.

Another argument of Petitioner is based upon the dissents of Judge Noonan of the Ninth Circuit in *Vaughan v. Cox*, 316 F.3d 1210 (11th Cir. 2003) and *Vaughan v. Cox*, 264 F.3d 1027 (11th Cir. 2001). Although *Vaughan* did involve the use of deadly force, this argument has little application to the questions presented because the opinions are contained in dissents, from cases decided in 2001 and 2003, are factually distinguishable, and based upon

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[5] Indeed, citation to *Haddaway v. Ellerbusch*, 996 F.2d 1211, 1993 WL 238997 (4th Cir. June 30, 1993) is only in passing, since it was an unpublished decision.

the view that an officer, who failed to fire a warning shot, should not be entitled to qualified immunity because " . . . as a reasonable police officer [he] is presumed to be familiar with *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)." 316 F.3d at 1216.

In *Tennessee v. Garner*, 105 S.Ct. 1694, 1701 (1985), decided only two years before this incident, it was held that the use of deadly force was lawful when limited to where the officer "has probable cause to believe the suspect poses a threat of serious physical harm, either to the officers or others." *Id.* Thus, even the dissents in *Vaughan* do not conflict with the Court of Appeals source of decisional law, nor establish a consensus of other persuasive authority.

Petitioner fails to show that there is a persuasive consensus of the other circuits' approach on the source of clearly established rights or law. Petitioner concedes that the Second Circuit view is unclear. *Varrone v. Billoti*, 123 F.3d 75 (2nd Cir 1997), relying upon *Weber v. Dell*, 804 F.2d 796 (2nd Cir. 1986) was appropriately challenged, in *Poe v. Leonard*, 282 F.3d 123, 141 (2nd Cir. 2002). In *Weber* the issue of the source of precedent for clearly established law for the circuit was not discussed. On the other hand, in *Wright v. Smith*, 21 F.3d 496 (2nd Cir. 1994) the view was reiterated that "[w]e have held that in determining whether a right was clearly established at the time the defendants acted, a court should consider: . . . (2) *whether the decisional law of the Supreme Court and the applicable circuit court supports the existence of the right in question*; . . . " (citations omitted) (emphasis supplied). 21 F.3d at 500.

In *Atkinson v. Taylor*, 316 F.3d 257 (3d Cir. 2003), the Third Circuit, does rely upon cases of other circuits that had construed this Court's decision in *Helling v. McKinney*, 509 U.S. 25, 36, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1994) to find a violation of the Eighth Amendment clearly established where prison officials failed to provide for the medical needs of prisoners exposed to ETS. However, as the dissent ably explains, "the majority calls this conclusion 'clearly established' federal law, meaning that a reasonable prison official should have known that we would decide the case this way, even though the circuit courts have reached numerous differing results on this issue and there is no controlling precedent." *Id.*, 316 F.3d at 271. This view appears more consistent with *Wilson v. Layne*, 526 U.S. 603, 618, 119 S.Ct. 1692 (if judges disagree on a constitutional question, it is unfair to subject officials to money damages for picking the losing side of the controversy).

In *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002), *cert. denied*, 123 S.Ct. 1355 (2003) the *en banc* decision of the Fifth Circuit did resolve a conflict of circuit panels on the source of decisional law in favor of reviewing other circuit decisions for determination of whether a right under the Fourteenth Amendment "state-created danger theory" had been clearly established. However, the difficulty of this approach, in qualified immunity, is emphasized by the number of concurring and dissenting opinions. After reviewing other circuit decisions the Fifth Circuit correctly observed:

> Thus, while a number of our sister circuits had accepted some version of the state-created danger theory as of July of 1993, given the inconsistencies and uncertainties within this alleged consensus of authorities, an officer acting within the jurisdiction of this court could not possibly

> have assessed whether his or her conduct violated this right in the absence of explicit guidance from this court or the Supreme Court.

Id., 305 F.3d at 321. This decision corroborates that decisional constitutional rights will only provide clear warning, if established by the applicable circuit or this Court.

In the Sixth Circuit, it has been established that to determine whether a constitutional right is clearly established reference can be made, as a last resort, to decisions of other circuits. However, such a search is only a possibility to be made in the extraordinary case and where "these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988).

The Seventh Circuit has looked to other circuits for analogous cases to determine whether the law is clearly established, in the absence of precedent. *See Donovan v. City of Milwaukee*, 17 F.3d 944, 953 (7th Cir. 1994). But even then, the court recognized that this is a "heavy burden" and that where there are differing circuit decisions, the relevant case law is still developing, and thus, is not clearly settled, *citing to Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir.), *cert. denied*, 493 U.S. 831, 110 S.Ct. 101, 107 L.Ed.2d 65 (1989). *Id.*, 17 F.3d at 953.[6]

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[6] The issue in *Donovan*, the extent of constitutional rights involving high speed police chases was ultimately decided by this Court in

(Continued on following page)

The Tenth Circuit approach is somewhat different in that, in the absence of binding precedent of this Court or the Tenth Circuit, it can look to the other circuits to determine whether a "clear weight of authority" has been established. *Garcia by Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987).

The Eighth Circuit does appear to have followed the lead of the Ninth Circuit in adopting a wide-ranging approach that allows it to search for clearly established law, in the absence of binding precedent, from any source, including District Court decisions. *See Ward v. San Diego County*, 791 F.2d 1329 (9th Cir. 1986).[7] Additionally, this doctrine considers that law may be clearly established if it is likely "that the Supreme Court or this circuit would have reached the same result as courts which had previously considered the issue." *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988). *See Capoeman v. Reed*, 754 F.2d 1512, 1515 (9th Cir. 1985). These circuits hold that "[g]overnment officials are charged with knowledge of constitutional developments, including all available decisional law. *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1048 (9th Cir. 1988)." *Tribble*, 860 F.2d at 324. Although the circuits supposedly do not impose a requirement that officers be law professors or academicians, it certainly requires them to be able to comprehend and apply the legal analysis employed to factually different circumstances. *See Capoeman v. Reed*, 754 F.2d

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County of Sacramento v. Lewis, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

[7] In *Ward* the Ninth Circuit relied upon the prior decision of *Tinetti v. Wittke*, 479 F.Supp. 486 (E.D. Wis. 1979), adopted on appeal by the Seventh Circuit, 620 F.2d 160 (7th Cir. 1980). The decision's vitality was questioned by the Eleventh Circuit in *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000).

1512, 1514 (9th Cir. 1985). State officials are then called upon to stake their financial resources on their prognostication of how the Court of Appeals would later decide, a wager that would unlikely be made by any law professor or academician.

Petitioner mistakenly relies upon the *dicta* of the dissent in *Trulock v. Freeh*, 275 F.3d 391, 407 (4th Cir. 2001), *cert. denied*, 123 S.Ct. 621 (2002) as establishing the view of the Fourth Circuit. In this *Bivins* action against FBI agents, the majority held, based on a review of its decisions, that although prior precedent held that a search of a locked footlocker was unlawful, it did not follow that a search of password protected computer files was so analogous to defeat the officers' qualified immunity. *Id.*, 275 F.3d at 404.

In *Amaechi v. West*, 237 F.3d 356 (4th Cir. 2001), although it is stated that the Court of Appeals viewed *Wilson* as permitting review of a "consensus of persuasive authority" for clearly established law on an issue, the decision was based upon a finding that "[f]irmly rooted Supreme Court and Fourth Circuit precedent involving strip searches and body cavity searches should have made it apparent to West, as a reasonable officer, that his search of Amaechi was unlawful under the Fourth Amendment." *Id.*, 237 F.3d at 364.[8]

As recent as 1998, the Fourth Circuit agreed with the Eleventh and Sixth Circuits as to the source of decisional law. In *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998), *en banc*, it was noted,

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[8] In this decision, and a number of others cited by Petitioner, the "clearly established right" involved either a strip or cavity search, not the use of deadly force.

> The law is clearly established such that an officer's conduct transgresses a bright line when the law has "been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980); *see Cullinan v. Abramson*, 128 F.3d 301, 311 (6th Cir. 1997) (explaining that "[o]rdinarily, at least, in determining whether a right is 'clearly established' this court will not look beyond Supreme Court and Sixth Circuit precedent"), *cert. denied*, 523 U.S. 1094, 118 S.Ct. 1560, 140 L.Ed.2d 792 (1998); *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n. 4 (11th Cir.1997) (en banc) (explaining that "the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, [the] Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose"), *cert. denied*, 522 U.S. 966, 118 S.Ct. 412, 139 L.Ed.2d 315 (1997).

141 F.3d at 114.

Upon certiorari review by this Court, it was observed, in *Wilson v. Layne*, 526 U.S. 603, 617, 119 S.Ct. 1692 (1999) that:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.

Id., 526 U.S. at 617. This Court also held that the officers in this case cannot have been "expected to predict the future course of constitutional law. *Procunier v. Navarette*, 434 U.S. 555, 562, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). *See*

also Wood v. Strickland, 420 U.S. 308, 321, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Pierson v. Ray*, 386 U.S. 547, 557, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967)." *Id.* 526 U.S. at 618. Finally, this Court observed that where the Courts of Appeals have differed on a constitutional question, "it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.*, at 617-618.

In fine, it is fair to say that without specific guidance on the subject from prior precedent from this Court, that differing views have developed on the source of "clearly established" law. However, it is not a fair conclusion that one approach is necessarily derived into a persuasive consensus, nor that the Court of Appeals is wrong in its view.

But most importantly to these officers, there simply is no substantive application of this argument to the issues in this case. Petitioner simply has not provided proof of a "consensus of persuasive authority" that clearly established that they were fairly warned that their conduct, in 1987, was unlawful.

To the contrary, as argued below, the persuasive weight of authority, as evidenced by analogous decisions of the Courts of Appeals, is that their conduct, under the circumstances facing them, was consistent with the Fourth Amendment and *Garner*. *See Nelson v. County of Wright*, 162 F.3d 986, 991 (8th Cir. 1998); *Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997); *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997); *Elliot v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996), *petition for reh'g en banc denied*, 105 F.3d 174 (1997); *St. Hilaire v. City of Laconia*, 71 F.3d 20, 28 (1st Cir. 1995); *Hegarty v. Somerset County*, 53 F.3d 1367 (1st Cir. 1995), *cert. denied*, 516 U.S. 1029, 1165 S.Ct. 675, 133 L.Ed.2d 524 (1995); *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 697 (1st Cir. 1994); *Harrell v. Decatur County, Ga.*, 41 F.3d 1494 (11th Cir. 1995), *vacating and adopting dissent in* 22 F.3d 1570 (11th Cir.

1994); *Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994); *Plakas v. Drinski*, 19 F.3d 1143, 1148-50 (7th Cir. 1994).

III. The law-of-the-case doctrine has not been rejected by the Court of Appeals in qualified immunity cases, nor are the other circuits' views to the contrary; it simply was not applicable to the decision below.

A. The Court of Appeals decision does not conflict with its own precedent.

Petitioner again raises the argument that the Court of Appeal's first unpublished decision on qualified immunity, that was addressed by both the District Court and the circuit court opinions is binding law of the case that precludes further review of the issue.

As it was not addressed previously, it is presumed that this Court found the issue, then premised upon a dissent to denial of a petition for rehearing *en banc*, to be without merit. Petitioner has now discarded the initial premise in favor of alternative arguments that the Court of Appeals either did not follow its own precedent or that the decision of the Court of Appeals is contrary to the other Courts of Appeals.

As the remand from this Court was to re-consider the decision in light of *Hope v. Pelzer*, the Court of Appeals did not solicit supplemental briefing, nor address this argument in rendering its decision. Thus, this claim is at best, moot, and for practical purposes barred from further reconsideration.

The initial panel decision, on appeal of the denial of the officers' motion for summary judgment, was based upon a finding that there were material issues in dispute. Such a basis has not been found to have preclusive effect on further reconsideration of the defense at trial. There

was no determination of clearly established law that would deny qualified immunity to the officers, in the unpublished decision. [*See* Pet. App. F].

In this case, the seminal issue was timing. Prior to trial it was not established as to whether Willingham was shot after everything was over or whether the use of force was an integral part of the event. Indeed, as noted several times in the opinion of the Court of Appeals post trial, Willingham testified at trial that she was shot within a "split second" of throwing a knife at Panucci and raising her hands into the air. Moreover, it was established at trial that the entire event occurred with 90 seconds, clearly calling for the sort of "split-second" judgments of the officers envisioned by *Graham v. Connor*, 109 S.Ct 1865, 1872 (1989). *See Willingham v. Loughnan*, 261 F.3d 1178 (11th Cir. 2001).

Moreover, the criminal court transcript had not been presented nor reviewed by either the District or Circuit Court to determine the parameters of the preclusive effect of the criminal convictions. After its presentation at trial, it was given some weight by the District Court. However, the full legal import was only correctly recognized by the Court of Appeals.

In the first unpublished decision, the Court of Appeals did not make a judicial finding of fact. The District Court, in denying summary judgment found that "there remain in dispute genuine issue of material fact regarding the circumstances involved in the incident in question – and thus the applicability of qualified immunity to the case." [Pet. App. G, p. 79a]. The Court of Appeals, in affirming this finding, stated that since it declined to address the preclusive effect of the criminal conviction without having the criminal court transcript to review, if Plaintiff's version of the facts were accepted and "*[i]f* the officer fired on plaintiff even though she was posing no threat to

anyone, *they would have* violated clearly established law." [Pet. App. F, p. 78a]. (emphasis supplied).

This does not establish that the officers were not entitled to qualified immunity under the facts of the case – it was nothing more than a supposition that ***IF*** those facts which Plaintiff claims are in dispute are the ultimate facts and that the criminal trial transcript and conviction are not considered, then there would be no entitlement to qualified immunity. However, as the Court of Appeals addressed in detail, the facts at trial and the review of the criminal trial transcript and judgment show that there was clear entitlement to qualified immunity. *Id. See Johnson v. Jones*, 515 U.S. 304, 311, 319-20, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) (where genuine issues of material fact exist, the officer is entitled to appeal the District Court's denial of his qualified immunity defense at the conclusion of trial). Petitioner has not argued that the facts were the same at the motion for summary judgment stage as at trial.

In her supplemental brief on reconsideration, Petitioner did not suggest that the Court of Appeals position was contrary to the other circuits. Indeed, Petitioner relied upon previous Eleventh Circuit authority for the proposition that "[i]t is firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled *en banc*, or by the supreme court." *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1313 (11th Cir. 2001). [Resp. App. A, p. 15a].

When considering the motion for summary judgement, the District Court did not address clearly established law in its denial of summary judgment, nor did the Court of Appeals. As the District Court found in its order on

post-trial motions for judgment, ". . . . the officers properly and timely request that the Court revisit this factual issue, the Court still finds that the qualified immunity defense turns on issues of fact that were properly resolved by the jury." [Pet. App. D, p. 41a, n. 4]. The Court of Appeals found this to be error.

Moreover, Plaintiff's claim that the Court of Appeals rejects the application of the law-of-the-case doctrine is meritless. Having now discarded the argument (although it is still cited as authority – [Pet. at 26]) that Judge Tjoflat's *dissent* to the *denial of a request for hearing en banc* in *Riley v. Camp*, 130 F.3d 958 (11th Cir. 1997) is authority for the proposition, Petitioner now claims that *Oladiende v. City of Birmingham*, 230 F.3d 1275 (11th Cir. 2000) supports that contention.

However, *Oladiende* did not reject the application of the law-of-the-case doctrine to qualified immunity cases. The Court of Appeals, simply, after thoughtful, cogent discussion, found it not applicable to the case. *Id.* 230 F.3d at 1290.

Similar to the proceedings below in this case, the prior unpublished decision did not delineate established facts and find that there was no entitlement to qualified immunity – it simply found that facts were in dispute. [Pet. App. F, p. 78]. As the analysis of the issue of *Oladiende* concluded:

> Where a previous panel has given no explanation for its decision, a subsequent appellate court panel is "not bound by any 'law of the case' unless a determination by us concerning the propriety of [the district court's order] is necessarily inconsistent with every possible correct basis for the earlier rulings of this court." *Key v. Wise*, 629 F.2d 1049, 1054-55 (5th Cir. 1980). One correct basis for this court's earlier ruling is that there

> remained genuine issues of material fact in dispute requiring a trial as to the police department's interests and the individual defendants' motives in transferring the plaintiffs. Such a ruling would present no binding conclusion of law as to the defendants' qualified immunity, but would simply allow the case to proceed to the jury. A conclusion now, after the facts have been developed at trial, that the defendants are entitled to qualified immunity would not be inconsistent with this possibly correct basis for the earlier ruling of this court.

Oladiende, 230 F.3d at 1289-1290.

As far back as 1984, the Court of Appeals, in *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437 (11th Cir. 1984), delineated the general contours of law-of-the-case doctrine as above, and noted that there were certain exceptions, including when (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice. These principles are markedly similar to those of the Third Circuit in *In re City of Philadelphia*, *supra*.

Most central to the consideration of this doctrine in this case is that in those cases where a motion for summary judgment based on qualified immunity is denied, because the facts are not fully developed, the District Court should be free to revisit the qualified immunity question during and post trial to determine whether the facts, as developed at trial, differ from those taken in the light most favorable to the plaintiffs at the summary judgment stage. *See Kelly v. Curtis*, 21 F.3d 1544, 1546 (11th Cir. 1994) (defendants may raise qualified immunity

anew at trial in motions for judgment as a matter of law because, "'rulings on summary judgment motions' are 'the facts for present purposes,' but they 'may not be the actual facts.'"); *see also Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1233 (11th Cir. 1992).

If the facts presented by plaintiff at the summary judgment stage become, without notable exception, the "actual facts" as developed at trial, then the qualified immunity determination, if made by a prior appellate panel, should not be revisited. If however, as here, there truly was no qualified immunity determination made and there was a notable difference as to the facts and development of evidence (e.g., criminal trial transcript introduced; plaintiff admitting she was shot within a split second of throwing a knife) then the defendant's right to raise qualified immunity should be, as it was, preserved. *See Johnson v. Jones*, 515 U.S. 304, 311, 319-20, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) (where genuine issues of material fact exist, the officer is entitled to appeal the District Court's denial of his qualified immunity defense at the conclusion of trial, once the factual issues have been resolved).

B. The Court of Appeals' decision is not contrary to the other Courts of Appeals.

Petitioner now suggests that the Court of Appeals position was contrary to the other circuits. In *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), the Sixth Circuit recognized and concurred with the Court of Appeals analysis of the first panel decision below. The Sixth Circuit specifically found that:

> Uncertainty about the actual duties of these positions, when their inherent nature is not apparent (no parties to this suit have cited any

> helpful state or county law defining the duties of the positions), precludes us from reversing the district court's determination. We emphasize that qualified immunity may become available to Testa with respect to any of these positions as the facts are crystallized or the relevant state/county law is developed before the district court at any time up to or including the conclusion of trial. Our current disposition of this case does not prevent the district court from granting qualified immunity to Testa with respect to any of these positions.

Id., 97 F.3d at 1561, 1562. This hardly supports Petitioner's contention of conflict.

In *Kimberlin v. Quinlan*, 199 F.3d 496 (D.C. Cir. 2000) the individual defendants moved for summary judgment on qualified immunity which was denied by the District Court, finding that the law was clearly established that prison officials could not interfere with prisoner's First Amendment right to access to the press. This issue was not appealed, but other issues were. When remanded back to the District Court, it refused to revisit the issue on a *renewed motion for summary judgment*, relying on its previous decision as being the law of the case, *since that issue had not been appealed.* The Court of Appeals affirmed, on the same grounds. *Id.*, 199 F.3d at 498, 499.

In *In re City of Philadelphia*, 158 F.3d 711 (3d Cir. 1998) a prior appeal on summary judgment, which found that city officials were entitled to qualified immunity, had determined that the conduct of city officials constituted a

seizure of plaintiff by the City within the meaning of the Fourth Amendment. Since, as the Third Circuit emphasized, " . . . that because the evidence was at least as strong at trial on the issue of seizure as it was at the summary judgment stage, our prior ruling that a seizure occurred controls our resolution of this appeal." *Id.* 158 F.3d at 722. No such finding was made below that the summary judgment evidence was the same as it was at trial. Indeed, the Court of Appeals pointed out the lack of certain evidence caused it not to consider the legal issues.

Thus, the Court of Appeals' analysis does not differ from that of the other circuits. *See McCloud*, 97 F.3d at 1561, 1562 (qualified immunity may become available as the facts are crystallized or the relevant law is developed before the District Court at any time up to or including the conclusion of trial); *In re City of Philadelphia*, 158 F.3d 711, 718 (doctrine does not preclude reconsideration where: (1) new evidence is available, (2) a supervening new law has been announced, or (3) the earlier decision was clearly erroneous and would create manifest injustice).

Nor is it contrary to this Court's decisions. In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court found that qualified immunity could be the subject of two *pre-trial* appeals, because the first may be on allegations and the second on actual facts found in discovery.

CONCLUSION

In her second petition to this Court, Petitioner raises new issues not timely pressed in the District Court or the Court of Appeals.

The Court of Appeals was directed to reconsider its prior decision in light of *Hope v. Pelzer*. Petitioner did not

provide any relevant authority to the Court of Appeals showing that the officers had fair warning of clearly established law mandating that their conduct, under the circumstances presented in the case, was unlawful. Nor has Petitioner provided such analysis to this Court.

Petitioner has not provided any consensus of persuasive authority from the other Courts of Appeals on the issues in this case that conflicts with precedent of the Court of Appeals.

The law-of-the-case doctrine has not been rejected by the Court of Appeals generally nor specifically in this case. It is simply not applicable under the facts.

What Petitioner suggests is that despite the law of this Court and The Courts of Appeals consistently holding that their conduct was lawful, Officers Loughnan and Buecler should have been prescient enough, in the split second they had to decide, to predict a future course of constitutional law that remains undisclosed. The looming reward for this choice is financial ruin. The Court of Appeals correctly found they had immunity from this action.

The petition should be denied.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 99-4005

D.C. DOCKET NO. 90-8156-CIV-UUB

BETTY WILLINGHAM,

Plaintiff/Appellee/Cross-Appellant,

v.

JAMES LOUGHNAN and BRIAN BEUCLER,

Defendants/Appellants/Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

APPEAL ON REMAND FROM THE UNITED STATES SUPREME COURT

APPELLEE'S SUPPLEMENTAL BRIEF

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D. ARGUMENT

I. THE IMPACT OF HOPE V. PELZER

The United States Supreme Court in *Hope*, specifically disappproved this Court's method of requiring facts of previous cases be "materially similar" in order for a plaintiff to overcome the qualified immunity defense. *Id.* at 2516. Based upon *Hope*, this Court, in its August 15, 2001 opinion, incorrectly granted qualified immunity, stating that:

> "[a]lmost always, to establish the law clearly in the context of the Fourth Amendment, *a materially similar case must have already decided that what the police officer was doing was unlawful*. . . . ('[N]o bright line exists for identifying when force is excessive; we have therefore concluded that unless a controlling and materially similar case declares the official's conduct unconstitutional, a defendant is usually entitled to qualified immunity."). . . . Our own survey of the case law indicates that in 1987 it was not clearly established that it constituted excessive force to shoot a person under the circumstances presented in this case." (Emphasis added). *Willingham, supra* at 1187.

The Appellants have argued that "[o]nly where there is a pre-existing, 'factually defined' case which is precisely on point can a litigant survive the defense of qualified immunity before the court of Appeals for the Eleventh Circuit." (Respondents' Brief, p. 5). While this is a correct statement of this Court's previous position with respect to qualified immunity, the Supreme Court opinion in *Hope* has determined that it was an incorrect position.

> "This rigid gloss on the qualified immunity standard, though supported by Circuit precedent, is not consistent with our cases. . . . Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be fundamentally similar. Although earlier cases involving fundamentally similar facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with materially similar facts. Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law in [1987] gave respondents fair warning that their alleged treatment of [Willingham] was unconstitutional."

Id. at p. 2511. Clear "fair warning" had been provided to Appellants both through case law, their training and common sense. Would any court in this land justify and condone a shooting by one of its citizens, let alone a supposedly highly trained police officer, under like circumstances? As best stated by this Court in its September 2, 1997 ruling: "According to plaintiff, she was shot when she was merely standing in the doorway of her house, screaming and pulling her hair and posing no threat to anyone. *If the officers fired on plaintiff even though she was posing no threat to anyone, they would have violated clearly-established law.*" (emph. added). (Appendix 2, p. 38a). Such a determination by this Court came as a result of evaluating several cases from this Court and the Supreme Court which clearly dictate that excessive force used in similar circumstances has been determined to be not

entitled to qualified immunity. *Tennessee v. Garner*, 471 U.S. 1 (1985); *Clark v. Beville*, 730 F.2d 739 (11th Cir. 1984); *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985); *Samples v. City of Atlanta*, 846 F.2d 1328 (11th Cir. 1988); *Vasquez, supra; McKinney by McKinney v. DeKalb County, GA.*, 997 F.2d 1440 (11th Circuit 1993). *McKinney* is of particular interest, as this Court determined that the officer in question was not entitled to qualified immunity, despite evidence that at the time of the shooting plaintiff "allegedly had a butcher knife in one hand and a twelve-inch stick in the other." *Id.* at 1442. According to this Court:

> "The law was clearly established before Nelsen's actions in March 1990 that police use of excessive force is a constitutional violation. *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500-02 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986). The district court correctly held that the facts are in dispute as to what happened that led Officer Nelsen to fire his gun. As alleged by the plaintiffs, however, Abdul had previously put down his knife and was merely shifting position, not threatening the safety of any persons, when Officer Nelsen shot him."

Id. at 1443.

Additionally, the Appellants own conduct supports a finding that they knew that their conduct of shooting an unarmed woman when she was a threat to no one was unconstitutional. The planting of a second knife by the Appellants and the fabricated cocaine evidence was solely for the purpose of covering up conduct which they knew to be unlawful.

"'[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.'" (emph. added) *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1313 (11th Cir. 2001).

The laws-of-the-case doctrine generally protects judicial findings of fact and law from subsequent review by the same court. "Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation." *Aguilar v. Agostini*, 521 U.S. 203, 236 (1997) (citing *Messenger v. Anderson*, 225 U.S. 436 (1912). The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice," *Arizona v. California*, 460 U.S. 605, n.8 (1983), "although as a rule courts should be loathe to do so in the absence of extraordinary circumstances . . ." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988). *See generally* 18B, C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4478 (2002) ("The standards announced for departing from the law of the case commonly demand strong justification.").

Given the accepted evidence in the instant case, taken in the light most favorable to Appellee, "no factually-particularized, preexisting case law was necessary for it to be very obvious to every objectively reasonable officer facing [Appellants'] situation that [Appellants'] conduct . . . violated [Willingham's] constitutional right to be free of the excessive use of force." *Vinyard v. Wilson*, 2002 WL 31521208 (11th Cir. 2002). "The peculiar facts of this case are 'so far beyond the hazy border between excessive and acceptable force that [every objectively reasonable officer]

had to know he was violating the Constitution even without caselaw on point." *Id.*

The criminal conviction of BETTY WILLINGHAM cannot justify gunning her down when she was a threat to no one. "The fact that the act to which the police responded was a criminal act does not foreclose the possibility that the officers' response was also illegal. . . . To conclude otherwise would give law enforcement authorities *carte blanche* to respond as they please to criminal activity." *Vasquez, supra* at 1108-9.

> "'[W]hen "the defendants" conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts' that the action as unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.' To hold otherwise would allow an officer who understood the unlawfulness of his actions to escape liability simply because the instant case could be distinguished on some immaterial fact, or worse, because the illegality of the action was so clear that it had seldom befcre been litigated." *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002).

II. THE LAW PROVIDED "FAIR WARNING," PRECLUDING ENTITLEMENT TO QUALIFIED IMMUNITY

The Supreme Court has held that where an excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as a claim invoking the protections of the Fourth Amendment. *Graham v. Connor*, 109 S.Ct. 1865, 1871 (1989). The Supreme Court stated:

> "Today, we make explicit what was implicit in *Garner's* analysis, and hold that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard rather than under a 'substantive due process' approach." *Id.*

The conduct of Appellants when they unreasonably seized the Appellee as she stood, threatening nobody, in the doorway of her home, by shooting her eight times while standing less than 6 feet away from her violated "clearly established law." This is particularly true, where, as in the instant case, the only thing in Ms. WILLINGHAM's hands was hair.

"An officer will be entitled to qualified immunity if his actions were objectively reasonable, that is if an objectively reasonable officer in the same situation could have believed that the force used was not excessive. . . . protecting from suit all but the plainly incompetent or *one who is knowingly violating federal law.*" (Citations omitted). (Emphasis added). *Vinyard, supra* at p. 4.

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation. . . . 'the next sequential step is to ask whether the right was clearly established.'" (citations omitted). *Id.* at p. 4. "'The Fourth Amendment's freedom from unreasonable searches and seizures encompasses the *plain right* to be free from the use of excessive force in the course of an arrest.'" (emph. added). (citations omitted). *Id.* at p. 4. The Supreme Court has stated that the qualified immunity

inquiry focuses on whether the plaintiff can identify "controlling authority in [its] jurisdiction at the time of the incident which clearly established the rule on which [it] seeks] to rely," or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617 (1999); *Hope, supra*. "Fair warning" can be demonstrated in various ways, and ". . . in the absence of fact-specific case law, the plaintiff may overcome the qualified immunity defense when the preexisting general constitutional rule applies 'with obvious clarity to the specific conduct in question,' and it must have been 'obvious' to a reasonable police officer that the pertinent conduct given the circumstances must have been unconstitutional at the time." (Citations omitted). *Vinyard, supra.* at p. 8. "'[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and *in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question*, even though "the very action in question has [not] previously been held unlawful"'" *Id.* at p. 8, citing to *Hope, supra* at 2516; *United States v. Lanier*, 520 U.S. 259, 271 (1997); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The law providing "fair warning" to Appellants at the time is as follows:

"Whenever an officer restrains the freedom of a person to walk away, he has seized that person." *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985). A seizure is not unconstitutional unless it is unreasonable. What is unreasonable or reasonable is determined by " . . . balance[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of

the governmental interests alleged to justify the intrusion." *Id.* at 1699 (Quoting *U.S. v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642 (1983)). "In conducting this balancing test, we are to consider 'the scope of the particular intrusion, and the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.'" *Gilmere, supra* at 1502 (11th Cir. 1985) (Quoting *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884 (1979). See also: *Clark, supra; Fundiller, supra; Samples, supra; Vazquez, supra; McKinney, supra.*

The Court in *Graham* held that "the 'reasonableness' of a particular force must be judged from the perspective of a reasonable officer on the scene, rather than [that of an officer] with the 20/20 vision of hindsight. The test of reasonableness is an objective one, without regard to the underlying intent or motivation of the officer. The proper question to be asked is whether the officer's actions were objectively reasonable under the facts and circumstances confronting him." *Graham, supra* at 1872. Whether the force used was excessive must be objectively determined and is a jury question. *Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991); *Posr v. Doherty*, 944 F.2d 91 (2d Cir. 1991); *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991); *Ortega v. Schramm*, 922 F.2d 684 (11th Cir. 1991).

In *Graham*, the Court held that it was reversible error for the trial court to apply the four-part test of *Johnson v. Glick*, 481 F.2d 1028 (2nd Cir. 1973) *cert. denied* 414 U.S. 1033 (1973) in a Fourth Amendment excessive force case. The Court noted that the *Johnson v. Glick* test which had previously been used to analyze excessive force claims was incompatible with a proper Fourth Amendment analysis. The *Johnson v. Glick* test required consideration of whether the individual officer acted in "good faith" or

"maliciously and sadistically for the very purpose of causing harm". The Supreme Court held that the consideration of these factors put in issue the subjective motivations of the individual officers, which has no bearing on whether a particular seizure is unreasonable under the Fourth Amendment. *Id.*

Addressing the use of deadly force, the United States Supreme Court stated:

> "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. *Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.* . . . Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." (Emphasis added). *Garner, supra* at 1701.

Garner is not restricted to force intended to cause death. *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985). It extends to "force capable of causing serious personal injury." *Id.* at 1479-1480, n.10. Under section 776.01 of Florida Statutes, deadly force "means force which is likely to cause death or great bodily harm. . . . "

In *Kidd v. O'Neil*, 774 F.2d 1252 (4th Cir. 1985), the Court noted that while *Garner* deals "specifically only with the extreme example of deadly force, nevertheless [it] makes clear that the use of any significant degree of excessive force in effecting otherwise constitutionally valid arrests may constitute an unreasonable seizure of the person in violation of fourth amendment rights." *Id.* at 1254. No bones need to be broken for a use of force to be "grossly disproportionate to the need . . . " *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981). (Police officer striking the plaintiff's camera with his nightstick, thereby causing the camera to strike and lacerate the plaintiff's forehead established a deprivation of his constitutional rights).

Even if the Appellants BEUCLER and LOUGHNAN had been attempting to effectuate a valid search, the force utilized was grossly disproportionate to what was required and would satisfy any balancing test. *Redley v. Leavitt*, 631 F.2d 358 (4th Cir. 1980); *Smith v. Hearod*, 498 F.2d 663 (5th Cir. 1974); *Green v. Cauthen*, 379 F.Supp. 361 (D.S.C. 1974); *Austin v. Hamilton*, 945 F.2d 1155 (10th Cir. 1991); *Turner v. County of Washoe*, 759 F.Supp. (630 (D.Nev. 1991); *Vasquez, supra.*

Given the claimed extensive training that officers received in the use of force, it may be questioned whether the assumption that police are frequently required to make "split-second" decisions is always an appropriate criterion for determining the reasonableness of the force. See: *Helseth v. Burch*, 258 F.3d 867, 876 (8th Cir. 2001). In the instant case, Appellants provided evidence to the district Court and the jury of their training with respect to "split-second" decision making abilities regarding the use of deadly force. What the evidence showed is that this training was ignored by the Appellant Officers. What the

evidence also demonstrated was that, at the time of the shooting, BETTY WILLINGHAM was obviously unarmed and a threat to no one, thereby precluding the defense of qualified immunity. *Clem, supra* at 552.

For this Court to award the Appellants with qualified immunity is only possible if this Court accepts the lies of the Appellants. Lies which were not accepted by the jury in this matter or the District Court. Appellants can only be entitled to qualified immunity only if this court determines, in contradiction to the jury, the District Court, and the original panel of this Court, that at the time of the shooting, Appellee "raised the second knife to her head and lunged, with the knife, towards Panucci" (Appellants' Initial Brief, p. 5; Appellants' Reply Brief, p. 1; Respondents' Brief, p. 1). In its August 15, 2001 opinion overturning the verdict and the District Court's ruling, this Court stated: ". . . she was not subdued; and 3) she was standing in the door to the kitchen where she had, just moments before, obtained weapons with which she had tried to kill one officer and assaulted another." *Willingham, supra* at p. 1187. At no time prior to this court's factual conclusion had the Appellants or anyone else alleged in any court the possibility of the Appellee rearming herself or, as previously stated, had there been a determination in the criminal proceedings that she "intended" to kill Panucci. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby,* 477 U.S. 242, 255 (1986). See also: *Eastman Kodak v. Image Technical Services,* 504 U.S. 451, 456 (1992).

In its August 15, 2001 opinion, this Court stated "Both Loughnan and Beucler fired two 'double-taps' at Plaintiff. . . . No argument was made at trial or on appeal that

the practice of shooting a 'double-tap' itself constitutes excessive force." *Willingham, supra* at p. 1182. Such a statement demonstrates that, unlike the jury and the District Court, this Court did not fully evaluate the accepted evidence in the light most favorable to the Appellee. If the Appellee was doing what the Appellants have alleged to the jury, the district court, this Court and the United States Supreme Court, it would be irrelevant how many bullets were fired at Ms. WILLINGHAM. What she proved to the District Court and the jury was what any reasonable officer under the same circumstances would know: You cannot shoot an unarmed woman once, let alone eight times, when she poses a threat to no one. BETTY WILLINGHAM proved this through her testimony, the testimony of Stanley Williams, the proven inconsistencies and lies by Appellants and members of the City of Boynton Beach Police Department, the testimony of both Appellee's and Appellants' police experts, both former police chiefs, and most importantly, the physical evidence.

CONCLUSION

For the foregoing reasons, the Appellee respectfully submits that this Court's August 15, 2001 decision should be reversed and that the District Court's judgment entered in her favor should be affirmed as to Appellants BEUCLER and LOUGHNAN in every respect.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BETTY WILLINGHAM,

Petitioner,

v.

JAMES LOUGHNAN and BRIAN BEUCLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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Petitioner, Betty Willingham, respectfully replies to Respondents' Brief in Opposition.

STATEMENT OF THE CASE

In their response, Respondents allege that Petitioner was simultaneously shot by them within a split second of having attempted to murder officer Panucci. (Respondents' Brief, p. 1). In fact, no evidence was presented by Respondents that they had simultaneously fired at the Petitioner, nor did they state that their actions occurred within a "split second of having attempted to murder officer Panucci." *Id.*

Respondents also state that:

> [a]ccording to the officers, who testified at her criminal and civil trial, she had a long blade kitchen knife in her hand and was attempting to stab Pannuci in the back at the time she was shot. *An independent witness testified at both trials that she was on the step outside her house with an object in her hand at the time she was shot.*

(Emphasis added). (*Id.*). Again, these misrepresentations are in direct contradiction to the eyewitness testimony and the physical evidence presented at the civil trial. In fact, the testimony of Mr. Williams, the "independent witness" can best be summed up by his statement that the reason he went to the police department, despite being warned not to, "I just went down there because *I thought it was my duty, because I thought they shot Betty for nothing.*" At the time that she was shot eight times by Respondents Beucler and Loughnan, Betty Willingham was standing in the threshold of her kitchen doorway with both her hands grasping her

hair and screaming for them to "stop the dog." The dog in question was Panucci's police dog that was attacking the Petitioner's brother.

According to Respondents,

> [t]he Court of Appeals, in an unpublished opinion, affirmed the denial of the motion for summary judgment due to the claimed factual dispute of whether Plaintiff was doing nothing at the time she was shot or was attempting to murder an officer. In the panel's view, the issue preclusion argument . . . was not properly presented for review.

(*Id.*, p. 2). This is also incorrect. On August 27, 1997, during oral argument, Respondents' counsel, in response to the Court of Appeals panel's questioning the Respondents' failure to provide the criminal trial transcript to the district court or the appellate court, responded that said transcript would not assist the court in determining the basis of the criminal jury's conviction of the Petitioner. (*See* Judges' tape of oral argument in Case No. 96-4714). The Eleventh Circuit affirmed the ruling of the district court, holding that

> . . . [a]lthough appellants seek to rely upon the plaintiff's prior conviction of attempted second degree murder, we decline to address any issue of collateral estoppel or issue preclusion because the appellants did not present the criminal trial transcript to the district court in support of their motion for summary judgment, nor did they include said transcript in the record on appeal. In the absence of any issue preclusion, and in the

> summary judgment posture of this case, we must accept as true plaintiff's version of the relevant facts . . . *If the officers fired on plaintiff even though she was posing no threat to anyone, they would have violated clearly-established law.*

(Emphasis added). *See* Appendix F, at 78a.

Respondents also argue that "[h]er version of the events was rejected when she was convicted in June 1989 of both crimes by the Palm Beach County criminal court jury, a conviction that was neither appealed nor vacated." (Respondents' Brief, p. 1). This is incorrect. While initially charged with attempted first degree murder, the Petitioner, at the criminal trial, was convicted of attempted second degree murder, which required no specific intent and was consistent with her testimony that she had thrown one knife in the direction of Panucci's dog. Nothing in the transcript of the criminal trial determines whether the Petitioner was convicted of attempted second degree murder of Pannucci based upon lunging or throwing a second knife, as alleged by the Respondents. In fact, at no time prior to or during the trial did Respondents cite to the district court any portion of the criminal transcript where it was determined from the record that the Petitioner had been convicted for throwing a second knife. At both the criminal and civil proceedings, the Petitioner admitted to throwing two bottles and one knife. Under Florida law, attempted first degree murder requires that a defendant had the specific intent to murder a particular person. By finding her guilty of attempted second degree murder, the criminal jury clearly based its verdict upon the admissions of the Petitioner that she had thrown two bottles and one knife. Based upon the evidence presented, the

Petitioner had completed the act for which she was convicted, and, at the time of the excessive force by Respondents, she was unarmed and not a threat to anyone.

Significantly, the district court, in denying Respondents' motion for judgment as a matter of law, stated:

> Having now had the opportunity to review the transcript of the criminal trial (to the extent available) in light of *Vasquez* and Florida law concerning collateral estoppel generally, the undersigned remains unable to conclude that Willingham's conviction necessarily resolved the question of whether the officers used unconstitutionally excessive force. Among other important distinctions, Willingham maintained in the criminal trial, just as she had in her civil trial, that she threw only one knife, and was unarmed at the time of the shooting. ***Thus, although the jury found her guilty of attempted second degree murder of Panucci, the jury may have resolved the conflict in the evidence concerning whether one or two knives were thrown to be consistent with Willingham's version of the offense.*** If that occurred, the jury would never have reached the issue of whether Willingham was acting in self defense and whether the officers were justified in the use of deadly force after the first knife was thrown. Thus, similar to *Vasquez, it cannot be ascertained whether Willingham's criminal trial jury ever addressed the propriety of Loughnan and Beucler's actions.*

(Emphasis added). *See* Appendix D, at 44-5a.

The district court went on to state:

> Given the conflicts in the evidence concerning the sequence of the pertinent events and the general nature of the verdict, Defendants cannot demonstrate that a determination that the officers were justified in shooting Willingham was a critical and necessary part of the jury's decision that Willingham attempted to kill Panucci. *Therefore, collateral estoppel and issue preclusion, did not preclude Willingham from proceeding to trial in this case.*

(Emphasis added). *See Id.*, at 46a.

Not only was the case law clear at that time that the conduct of the Respondents was unlawful, the testimony of the Respondents clearly shows that they knew their conduct was unlawful. They knew in 1987 what every other law enforcement officer in the United States knew: It was unlawful to shoot an unarmed person who posed a threat to no one. It was for this reason that they concocted the lies about what Petitioner was doing at the time that they shot her and planted a second knife under her body.

I. The questions presented for review were timely raised or decided in the district or circuit court below:

The Petitioner was the Appellee in the proceedings below. Contrary to Respondents' argument, Petitioner, throughout the proceedings in the lower courts, cited to the facts and authorities from this Court, the Eleventh Circuit and other circuits that demonstrated that Respondents had "fair warning" that their conduct violated clearly established law.

II. The decision of the Eleventh Circuit is in conflict with this Court's Fair Warning Standard and the Approaches of the Other Circuits

The second panel rejected all analogous cases presented by Petitioner, stating that the "Plaintiff has pointed us to no case of the Supreme Court, Eleventh Circuit, or the Supreme Court of Florida" that "were close to this one in time or fact." *See* Appendix A, p.10a. The second panel also stated that it had conducted its own review of case law and concluded that the law was not clearly established in 1987. *Id*; *See* Appendix C, p. 29a. In its refusal to consider opinions of other circuits, the Eleventh Circuit failed to consider such cases as: *Webster v. City of Houston*, 689 F.2d 1220 (5th Cir. 1982) (a youth who had just committed a felony was confronted by police and shot within seconds, although unarmed at that moment with hands raised and officers, knowing their conduct was unlawful, planted a throw down weapon to justify their actions); *see also Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); *Ellis v. Wynalda*, 999 F.2d 243 (7th Cir. 1993); *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999); *Palmer v. Hall*, 517 F.2d 705 (5th Cir. 1975).

The Eleventh Circuit erred in ignoring evidence of the planted weapon, the lies and cover-up to justify Respondents' actions. Respondents would have this Court believe that this evidence is irrelevant in a qualified immunity analysis. (Respondents' Brief, p. 12). Petitioner never attacked her conviction. What said evidence demonstrated to the jury and the district court was that Respondents were fully aware at the time of the shooting that their conduct was objectively unreasonable and unlawful at the time. The evidence of the totality of the circumstances surrounding the arrest, including the planting of a weapon and lies, is relevant

to the determination of qualified immunity. *Brown v. City of Hialeah*, 30 F.3d 1433, 1436 (11th Cir. 1994).

The Eleventh Circuit did not focus on the totality of the circumstances, as did the civil jury and the district court; instead, it extracted one word from all the evidence and testimony presented in a three week trial to create an illusion that Respondents were required to make a "split-second" decision to shoot Petitioner. In fact, the sole support for the "split-second" timing scenario comes from one leading question by Respondents' counsel in his cross examination of Petitioner at trial. Contrary to the Eleventh Circuit's apparent weighing of evidence and credibility determinations, this "split-second" timing was simply Respondents' counsel putting words into Petitioner's mouth and not corroborated by either Respondent or any other witness during this trial.

All other circuits, except the Eleventh, expressly or implicitly follow this Court's lead in *Wilson v. Layne*, 526 U.S. 603 (1999), and look beyond their own jurisdiction in their "fair warning" analysis. Respondents, throughout their Brief, continue to misrepresent the positions of the other Circuits in their approach to determining clearly established law.

III. The Eleventh Circuit's rejection of the law-of-the-case doctrine is in conflict with its own precedents, other circuits and this Court

According to Respondents, the first Circuit panel opinion

> . . . was nothing more than a supposition that IF those facts which Plaintiff claims are in dispute are the ultimate facts and that the criminal trial transcript and

> conviction are not considered, then there would be no entitlement to qualified immunity. . . . Petitioner has not argued that the facts were the same at the motion for summary judgment stage as at trial.

(Respondents' Brief, p. 24).

At the summary judgment stage, Petitioner provided evidence that at the time of the shooting, she was unarmed and a threat to no one. At the trial, the Petitioner proved that she was unarmed and a threat to no one. In fact, the "ultimate facts" or actual facts were more chilling than what Petitioner had initially presented in her response to summary judgment.

Respondents, reading this Court's collective mind, presume that, in remanding this case back to the Eleventh Circuit for reconsideration in light of *Hope v. Pelzer*, 122 S. Ct. 2508 (2002), without addressing the specific issues raised in the first petition, this Court has found that the issue of the law-of-the-case doctrine, ignored by the Eleventh Circuit in both appeals, as being without merit. Petitioner argued this issue before the Court of Appeals on both occasions. The fact that the Eleventh Circuit refused to explain its rejection of its own precedents in the instant case is no indication that the issue was not considered by the lower court.

Respondents claim that, when denying the motion for summary judgment, neither the district court nor the Court of Appeals (first panel) addressed clearly established law and that the first panel "simply found that facts were in dispute". (Respondents' Brief, pp. 24-25). Only by revising the facts and omitting the relevant portion of the first panel's decision can they rely on *Oladeinde v. City of Birmingham*, 230 F.3d

1275 (11th Cir. 2000), for the proposition that the law of the case had not been established in this regard. None of the exceptions cited by *Oladeinde* are present in the instant case.

The second panel of the Court of Appeals simply refused to consider its own law-of-the-case doctrine, preempting both the jury and the district court's findings of fact, simply interjected its own different conclusions of fact by weighing the evidence and credibility of the witnesses. It is particularly notable that none of the independent eye witness testimony was even mentioned in either of the second panel's opinions, nor was the evidence of the planted weapon and cocaine.

> [T]he "law of the case" rule is based on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members", and that it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigate anew in the same case upon any and every subsequent appeal" thereof.

Gaines v. Dougherty County Board of Education, 775 F.2d 1565, 1568 (11th Cir. 1985). *See also Heathcoat v. Potts*, 905 F.2d 367, 370 (11th Cir. 1990); *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169, 106 S. Ct. 2889, 90 L. Ed. 2d 976 (1986); *Burger King Corp. v. Pilgrim's Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994).

The evidence presented at trial supports the findings by the jury that the Respondents violated the Petitioner's constitutional rights by using excessive force and that the constitutional right was "clearly established" at the time, thereby precluding the defense of qualified immunity. By "almost always" providing law enforcement with qualified immunity, the Eleventh Circuit has provided police officers with "carte blanche" in the manner in which they respond to criminal activity. *See* Appendix A, p. 7a. *See Vasquez v. Metropolitan Dade County*, 968 F.2d 1101, 1108-9 (11th Cir. 1992); *Graham v. Connor,* 109 S. Ct. 1865 (1989); *Brandenburg v. Cureton*, 882 F.2d 211 (6th Cir. 1989); *Hernandez v. City of Los Angeles,* 624 F.2d 935 (9th Cir. 1980).

CONCLUSION

For the foregoing reasons and as stated in her Petition, Petitioner respectfully requests that the Court grant certiorari.

Respectfully submitted,

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